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No.

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In the

Supreme Court of the United States

OCTOBER TERM, 1980

LEODA WREN, et al.,

Petitioners,

vs.

NOLAN JONES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a case charging that respondent state officials discharged civil servants in violation of the First and Fourteenth Amendments:

(a) May petitioners' right to belong to a political party, *simpliciter,* be restricted by "balancing" other State interests against it?

(b) Have the plaintiffs (petitioners here) proved a *prima facie* case if they show that their constitutionally protected activity was a motivating factor in their discharge, or must they show that activity was the *sole* motivating factor?

(c) Can an appellate court substitute its own opinion for a District Judge's specific findings of fact as to motive and intent to violate constitutional rights and as to other issues, based upon inferences drawn from complex and conflicting testimony and circumstantial evidence?

2. Were petitioners denied their rights under the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment when respondents not only terminated their State employment but also precluded them from regaining it because they were Republicans?

3. Were petitioners denied procedural due process when they were denied any form of administrative or judicial hearing before or after being permanently laid off or discharged from their civil service positions?

4. Did the District Court abuse its discretion by assessing against the prevailing party half of petitioners' reasonable attorneys' fees on the condition that the findings of individual liability be sustained on appeal?

5. Should the judgment orders of the District Court (Appendices C through H) be corrected to allow (a) compensation for petitioners' overtime and (b) the 50% of their attorney's fees under 42 U.S.C. § 1988 which those orders deny?

6. As corrected, should those orders be reinstated?

LIST OF PARTIES

RESPONDENTS:

Illinois Department of Transportation
Former Secretary Langhorne Bond
Present Secretary John Kramer
Former Assistant to Bond, J. Brian Hannigan
District 9 Assistant District Engineer, Richard Miley
District 9 Business Manager, Donald Shelton

Illinois Department of Personnel
Former Director Nolan B. Jones
Present Director William R. Boys
Chief Field Officer, Robert Rhoads
Manager, Classification Division, David Knox Assistant to Director, Berwyn Hanley

Illinois Department of Mental Health
Former Director Leroy P. Levitt
Present Director Robert de Vito
Former Assistant to Levitt, Alfred P. Ronan

PETITIONERS:

Leoda Wren, Edward F. Atkins, Claris D. Barger, Lacie Dean Betts, James Paul Caldwell, Carl Dixon, Luster Etheridge, Arnold John Kommer, Rollie Linder, Robert Gale Lovellette, Theodore Jewell Patterson, Richard Dwight Peeler, Paul Potter, Forest Ray Simmons, Jewell Elbert Sisk, *Lillie Mathis, Velma Jenkins,* William Roosevelt Brooks, Charles Leroy Cochran, Ira Walter Harper, James Edward Johnson, Arthur William Meinders, William Allan Peeler, Charles Anthony Wenzel, *Verla Casey,* and Lowell Ray Holmes

(The italicized names are the widows of four original plaintiffs who died since this action was filed in 1973. They were substituted for their deceased husbands by orders of the District Court. Petitioner Barger is a former employee of the Department of Mental Health. Therefore, although the petition frequently refers to petitioners as "26 highway workers," this is not literally true.)

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PETITION FOR CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on December 10, 1980. (App. 21)

OPINIONS BELOW

The opinion of the Court of Appeals is Appendix A. It is reported at 635 F.2d 1277 (7th Cir. 1981). The opinion of the District Court is Appendix B. It is reported at 457 F.Supp. 234 (S.D.Ill. 1978).

JURISDICTION

The opinion of the Court of Appeals is dated December 10, 1981. That court denied rehearing on March 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution: Amendment One:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution: Amendment Fourteen:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. §1343:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

42 U.S.C. §1988 (Supp. 1976):

> • • • • In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevaiilng party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF FACTS

Citations to "CA" are to the pages of the voluminous cross-appendix filed by petitioners in the Court of Appeals. This document is not presently before this Court.

Petitioners are 26 highway workers formerly employed as civil servants by the State of Illinois. (This simplifies the more precise description which appears in the footnote at page 3, *supra*.) Respondents are present or former executives of the State. Petitioners brought this action under 42 U.S.C. §1983, invoking the District Court's jurisdiction under 28 U.S.C. §1343. Petitioners sought reinstatement and damages.

After 15 days of trial, some 300 exhibits, and testimony from 25 witnesses, the District Court held that respondents violated petitioners' First Amendment rights by

depriving them of their state jobs and their opportunities for job-saving transfers and reinstatements because they were Republicans. (App. 31-38) The Court awarded reinstatement, $393,000 in damages, and 50% of their attorneys' fees. (App. 5-6 and App. E-G) The Court of Appeals reversed, assuming some infringement of petitioners' constitutional rights (App. 17) but holding that (a) petitioners had failed to prove that "*the* motivation" for respondents' action was that infringement, (b) petitioners had failed to pass the *Pickering* v. *Board of Education,* 391 U.S. 563 (1968) "balancing test," and (c) the District Judge's findings as to respondents' wrongful motive and intent, petitioners' injury, and respondents' defense were all "clearly erroneous." (App. 16-17, emphasis supplied.)

Petitioners proved that each successive Illinois administration since 1968, "has attempted to remove the patronage employees inherited from the former administration, place its own patronage people in those positions, and then to extend civil service coverage to its own new employees." (App. 3) The sequence was (App. 25-26): *First.* In 1968, the incumbent Democratic Governor got beat. His lame duck administration immediately ordered that its patronage workers in the Department of Transportation ("DOT") be included under civil service. *Second.* In 1969, the Republicans came in, revoked the civil service order, and replaced Democrats with Republicans. Then the Republicans placed all their people under civil service, while getting beat in the 1972 election. *Third.* In 1973 the new Democratic administration continued to operate a patronage system in DOT, notwithstanding the

continuing Republican civil service order. That patronage system was operating at DOT in June 1973 when petitioners were laid off, as respondent Rhoads admitted. (CA 70) Several months later, the Governor's Personnel Director, who is the lead respondent here, attempted to revoke the civil service order but was stopped by the State Civil Service Commission. (App. 3, 25)

In early 1973, some 27 previously laid off Democrats obtained a writ (the *"Bradley"* writ) from a State judge compelling DOT either to reinstate or to discharge them. (App. 24-26)

Petitioners here are the Republicans who had replaced the *Bradley* Democrats in 1969.* (For reasons lost in the antediluvian mists of Illinois political history, this process is known as "vicing.") In 1973, when the *Bradley* writ issued, petitioners were still protected by the civil service order of the departed Republican administration. (CA 6A, 255, 373, 387)

When the *Bradley* writ issued, respondent Hannigan who "was in charge of patronage at DOT" (App. 34) conferred with officials of the department. They decided to vice the same Republicans who had viced the *Bradley* Democrats four years before, rather than picking layoff candidates according to length of service or efficiency ratings. (App. 25-27)

The District Judge decided on the basis of a mass of testimony and circumstantial evidence that in vicing petitioners, *and denying them job-saving transfers and subsequent reinstatements to fill vacancies,* respondents had

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* This oversimplifies, but not materially. See App. 24 for the details. One petitioner here viced a *Bradley* Democrat from the Department of Mental Health, rather than DOT.

(a) acted with a motive and intent to discriminate against them because they were Republicans, and (b) failed to carry their burden of proving that they would have taken those harsh actions in any event, absent their discriminatory motivation. (App. 37-38)

The principal defense was that fiscal shortages and the *Bradley* writ compelled the layoff. As to the original vicing, respondents correctly pointed out that all DOT employees were then Republicans. Necessarily, anyone laid off was going to be a Republican. Meanwhile, DOT was already laying off some workers for fiscal reasons. Therefore, the Court of Appeals concluded that respondents were innocent. But the District Judge found (and the record shows) that a long series of circumstances having absolutely nothing to do with fiscal exigencies proved the motive for and successful execution of a discriminatory plan to get rid of petitioners, and to *stay* rid of petitioners because they were Republicans. See the details at pages 16-23, below. The Court of Appeals never mentioned these findings or the evidence establishing them.

REASONS FOR GRANTING THE WRIT

The combination of five circumstances make this a case of great general importance:

(a) The First Amendment rights involved.

(b) The clear, specific character of the facts on which the District Judge found the Constitution violated.

(c) The way in which those facts (including any which may be deemed to favor respondents) would lend themselves to a clarification of this Court's crucially important burden of proof, public employment, and political free speech decisions.

(d) The plethora of cases invoking the burden of proof rule in *Mt. Healthy City School District Bd. of Ed.* v. *Doyle,* 429 U.S. 274, 287 (1977) (hereinafter *Mt. Healthy*). See the 156 reported cases listed and categorized at App. 62-72. This suggests the importance of reversing or adopting the Seventh Circuit's anti-*Mt. Healthy* rule which was followed in this case.

(e) The probable impact of the Seventh Circuit's conspicuous misuse of *Pickering* v. *Board of Education,* 391 U.S. 563 (1968) in this case.

1. The employment by the Court of Appeals (App. 17) of the *Pickering* v. *Board of Education,* 391 U.S. 563 (1968) "balancing test" is a major heresy bound to create confusion and do damage in future cases.

Pickering recognized that sometimes a balance must be struck between the right of a public employee to speak and the interest of his employer which that speech invades. But here the Court of Appeals applies that

balancing process to a civil servant's membership in the Republican Party. Since the State has no interest whatever which is invaded by such an association, and thus no right whatever to meddle with it (indeed, that is the gist of this case) it is impossible to understand how *Pickering* can be used against petitioners here. But the Court of Appeals did it, and by implication invited other judges (including *every* judge in the Seventh Circuit) to do the same.

2. For the second time in two years the Seventh Circuit has, in near identical terms, inverted the burden of proof rule of *Mt. Healthy*, 429 U.S. 274, 287 (1977). (App. 16; *McGill* v. *Board of Ed. of Pekin Elementary School Dist.*, 602 F.2d 774, 779 (7th Cir. 1979) (*Nota bene* 779 (n. 8).) The *Mt. Healthy* rule is vital. "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958).

The issue here is thus common and crucial to a multitude of public employment, labor, race discrimination, sex discrimination, free speech, and other kinds of cases. See the 156 *Mt. Healthy* cases at App. 62-72. In this case, the Seventh Circuit has transformed *Mt. Healthy* into something new and strange.

This is the context: On the basis of a small mountain of circumstantial evidence, the District Judge, applying the standards of *Mt. Healthy* (see App. 31-32, 37), held that respondents had violated the First Amendment rights of petitioners defined in *Elrod* v. *Burns*, 427 U.S. 347 (1976). (App. 31, 38) In reversing, the Seventh Circuit cited *Mt. Healthy* and then inverted its rule in deciding the case; the Court went on to reject the District Judge's crucial findings of motive and intent, in a context

which not only disregarded the trial judge's unique advantages as a fact-finder, but which clearly reflected an indifference to the policies underlying *Mt. Healthy's* carefully balanced distribution of burdens. This last speaks not to what the court *said,* but to what it did. (App. 16-17)

The Seventh Circuit change is fundamental: *Mt Healthy* says the plaintiff must show that his constitutionally protected conduct was "*a* 'motivating factor,'" in the defendant's challenged action. 429 U.S. at 287 (emphasis added). But here, the Seventh Circuit, three times in its three dispositive sentences, announces that plaintiff must show his constitutionally protected conduct was "*the*" motivating factor:

> [P]laintiffs' "conduct" was simply their membership in the Republican party, and such political association is clearly constitutionally protected. However, the crucial burden is upon the plaintiffs to show that this conduct was *the* motivating factor in the layoff decision. Here we must determine whether the district court's finding that such conduct was *the* motivating factor is clearly erroneous. We now hold, from a review of the testimony and other evidence before the district court, the finding that plaintiffs have satisfied their burden of proving that political affiliation was *the* motivating factor in their discharge is clearly erroneous. To paraphrase the Supreme Court, plaintiffs have simply failed to carry their burden, and this conclusion must end the constitutional inquiry. (App. 16, emphasis added.)*

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* The opinion's references in the immediately preceding paragraph to *Mt. Healthy* and *Arlington Heights,* both "dual motivation" cases, make the Court's three times repeated insistence on "*the* motivating factor" all the more striking, especially when viewed in light of *McGill* and of respondents' argument, both *infra.*

Respondents invited this result. After citing the *Mt. Healthy* passage in *Givhan* v. *Western Line Consol. School District,* 439 U.S. 410, 416 (1979), respondents wound up their burden of proof argument in the Court of Appeals with this: "*Branti* v. *Finkel,* [455 U.S. 507] dispels any doubt about the necessity of plaintiffs showing here that impermissible political discrimination was the *only* reason for the layoffs." Reply Brief of respondents in the Court of Appeals 12. Repeated at 13. (In order that these assertions may be seen in their full, if bewildering, context, we have reprinted the pages involved at App. 73-74.)

"*The* motivating factor" appears to be settled doctrine in the Seventh Circuit. See *McGill* v. *Board of Ed. of Pekin Elementary School Dist.,* 602 F.2d 774, 779 (7th Cr. 1979) which says the same thing in a similar context. This doctrine is the more remarkable in light of *Illinois State Employees Union, Council 34* v. *Lewis,* 473 F.2d 561 (7th Cir. 1972), where the tone of then Circuit Judge Stevens's burden opinion stands in great contrast to the present Seventh Circuit approach.

Uncorrected, the present case and *McGill* portend a sea change. If their rule is right, this Court ought to announce that momentous change now and preempt the widespread waste and confusion which delay will inevitably cause. *Cf., e.g., Love* v. *Sessions,* 568 F.2d 357 (5th Cir. 1978) (three jury trials of one *Mt. Healthy* case required, the third because of changing burden rules). If the new rule is wrong, this Court ought to say *that,* so Seventh Circuit litigants can receive fair trials and judges across the country can know that this Court's rule is alive and healthy.

3. For all practical purposes, the Seventh Circuit rule eviscerates the substantive constitutional protections involved. By requiring the victim to prove that the defendant's *sole* motive was to violate his rights, the new rule ensures that he will almost always lose; in practice, nobody ever acts with a monolithic sealed motive. The sole motive standard echoes the specific intent requirement imposed in criminal civil rights cases by *Screws* v. *United States,* 325 U.S. 91, 103-105 (1945). It is entirely inappropriate in the present context. Contrast *Monroe* v. *Pape,* 365 U.S. 167, 187 (1961). If a *Screws*-type rule is now to prevail, the sooner the Federal judiciary finds out, the better.

Even *Mt. Healthy* has been criticized as presenting "an extremely high, if not insurmountable, barrier to a victim's challenge. . . ." Note, *Patronage and the First Amendment after Elrod* v. *Burns,* 78 Colum.L.R. 468, 479 (1978). But the barrier presented by the Seventh Circuit is *truly* insurmountable.

4. The Court of Appeals misses the whole First Amendment point of the case as well as most of the evidence. The Court of Appeals reasoned that the *Bradley* writ combined with money shortages necessitated the layoffs of petitioners. Since all the workers in DOT at the time were Republicans, the Court concluded that political retaliation could not possibly be involved. "In the final analysis, that is what this case comes down to, whether the State of Illinois should have employed the *Bradley* plaintiffs without any equivalent reduction in personnel." (App. 18) But that is *not* "what this case comes down to." In thus painting with a broad brush the Court of Appeals simply ignored the massive evidence that respondents had acted to make sure that (1) peti-

tioners would be viced *regardless* whether a job-eligible *Bradley* plaintiff showed up; (2) petitioners would be forestalled from making job-saving transfers or obtaining reinstatements when *Bradley* plaintiffs died or quit. None of these actions by respondents had anything to do with DOT fiscal problems, or defying the *Bradley* writ, or anything else except a desire to see to it that the Republican petitioners were not only *moved* off the job but *kept* off the job. The trier of fact so found.

The Court of Appeals held that all the findings of the District Judge were "clearly erroneous." (App. 16) However, since the primary issues were those of motive and intent, the findings must be upheld if supported by evidence. *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949). It is not necessary to penetrate the evidentiary thicket except to see if a rational District Judge could possibly draw from it the conclusions this one did. Here the Court of Appeals applied a succession of wrong legal standards, hostile to this kind of litigation, coupled with a near-total disregard for the evidentiary basis of the District Judge's decision. It also ignored this Court's admonition peculiarly applicable to cases like this:

> [F]acts in a case like the instant one, when seen through the eyes of judges familar with the context in which they occurred, may have special significance that is lost on those with only the printed page before them. . . . That is one reason why we believe that the Court of Appeals, with only the printed page before [it] . . . , erred in reversing the District Court. The judge most famiilar with the context in which [the facts] occurred . . . was obviously the District Judge, since he heard and viewed the testimony and other evidence presented.
>
> *Mayor of the City of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 621 n. 20 (1974).

The District Judge in this case resolved the issues on the basis of this Court's *Mt. Healthy* standard, not the inversion of that standard established in the Seventh Circuit by *McGill* and adopted by the Court of Appeals at respondents' urging in this case.

The defense at trial was that budgetary constraints, not political bias, forced the (permanent) "layoffs," and the other acts directed against petitioners. Based on his view of the witnesses and the complex interaction of all the evidence, the trial judge found that defendants' motives were political, not budgetary. Among many circumstances proved by the evidence, the District Judge based his decision on these (the Court of Appeals mentioned *none* of them):

(a) Respondents' action took place in an intensely political and patronage-oriented environment. (App. 32-35) The lead actor was "[Respondent] Hannigan [who] was in charge of patronage at DOT" (App. 34) and through whom all hiring and firing of civil servants had to be cleared. (CA 4, 11-12, 23A) Shortly before the events in this case, Hannigan had been enjoined by a state court as a result of firing four Republicans and replacing them with patronage Democrats in the Department of Mental Health. (CA 76-80)

(b) On the same day respondent Rhoads laid off 25 petitioners, he authorized the hiring of 32 additional summer laborers in the same district. (CA 33A, 35) Rhoads got his instructions from "downtown." (App. 35) The process of authorizing and filling the 32 new jobs began when Hannigan conferred with "Mr. David Cleverdon, the patronage director in the governor's office . . . ." (App. 34) Rhoads admitted petitioners were qualified to fill the 32 new jobs. But, "[w]hen . . . Rhoads

attempted to get approval for [petitioners] to apply for voluntary reductions [transfers] as authorized under the personnel code, Hannigan told Rhoads that these requests could not be honored." (App. 34) Instead the positions were filled by Cleverdon's people. (CA 33A)

The Court of Appeals dismissed these findings without mentioning them, saying merely that it was "not persuaded" that the 32 jobs were "in the same class" as petitioners. (App. 17 n. 13) In short, the new jobs were "temporary" or "different" or some such, and therefore respondents' exclusion of petitioners from transfers to them could not be a rational basis for a District Judge to infer discriminatory intent and resulting injury. What this really means is that in the Seventh Circuit, as long as labels change, the District Judge may not draw an inference based on all the facts—plaintiff loses, absent a confession by the defendant. And here defendants refused to confess: Rhoads testified that the juxtaposition of firings, hirings, and (by implication) non-transfers was "coincidental . . . absolutely." (CA 33A) The District Judge watched him testify and didn't buy it; that turned out to be "clear error."

(c) ". . . [Petitioners] proved that during the period subsequent to [their] layoff, funding was available for at least five "ghost" employees in the district where [petitioners] were laid off." (App. 37) The ghosts were in fact hired. (CA 105-107) They were employees "who, although they were on the payroll, were very rarely seen and whose function was unknown to those working in the district. The conclusion that they were political patronage workers is inescapable." (App. 37) There had been no ghosts prior to April 1973 (CA 221) which happened to be when the *Bradley* writ issued. (App. 26)

The Court of Appeals said it wasn't "persuaded" that the ghosts were "in the same class" as petitioners, so they didn't count. (App. 17 n. 13) In other words, when respondents spend money on Democratic ghosts in preference to reemploying laid off Republican civil servants the District Judge may not consider that on the issue of motive, intent, and injury. Here, the District Judge might reasonably have concluded what he evidently did conclude: the job "classes" and work descriptions of the ghosts were irrelevant because the ghosts reported to no job and did no work.

(d) "[F]ive of the returning *Bradley* plaintiffs were thought physically incapable of performing their duties . . . ." (App. 33) The DOT medical committee found that they were not capable of performing the duties of their positions. The DOT staff attorney recommended that the Attorney General be contacted for filing a motion with the *Bradley* court to excuse the reinstatement of the five. (CA 42-42C, 616A, 619, 668) The request was taken to patronage assistant Hannigan. Nothing was done. The five men were rehired (CA 42C-D, 43A-B, 83-85) and five petitioners were thereby "viced." When one of the *Bradley* five died four months later (CA 668, A 561-m), no petitioner was called back to replace him.

(e) Apart from the medical examinations, five other *Bradley* plaintiffs did not pass DOT eye tests. (CA 616, 625, 671-5) Respondent Rhoads knew that if a person couldn't pass the eye test, he was not supposed to be employed. (CA 29) The five were employed anyhow. One of them resigned in less than two weeks, but his "vicee," petitioner Casey, was still terminated and not reinstated. (A56j, CA 43D-E, 696D, 700)

(f) One *Bradley* plaintiff never showed up. District 9 therefore requested that petitioner Caldwell not be laid off. (CA 637, 667A) Caldwell was viced the following week, on one day's notice. (A 56v) On September 29, 1973, *Bradley* plaintiff Rowe resigned. (A 56e) Petitioner Potter, who had been viced by Rowe, made a demand for reemployment, but was refused. (*Ibid.*) *Bradley* plaintiff John Davis died October 26, 1973. The corresponding petitioner, Meinders, made a similar demand but was also refused. (CA 43C, A 56k, 1) Hannigan told Rhoads these reinstatements could not be made. (CA 43F-G) Two *Bradley* plaintiffs, Bradley and Hileman, took leaves of absence immediately upon their reinstatement. No petitioner was reemployed for the period of the extended leaves. (CA 45A-C, 467A, 695, A 56e-f)

(g) The Personnel Rules required that layoffs be in seniority order. (CA 560, Rule 2-570) However, in DOT Rhoads decided that if they could find the man who viced the *Bradley* plaintiff in 1969, they did not have to follow the rule of seniority. (CA 27-32, 53-54, 292. 573, 575) Later, when layoffs were rescinded, Rhoads reinstated other employees on a seniority basis. However, petitioners Peeler and Johnson, who were in that same unit and had more seniority, did not get reinstated. (CA 49, A 7-12, 127-8, 181, 466-7) Rhoads admitted at trial there was no justification for what he did. (CA 44, A 11-12)

(h) A crucially important civil service record is the performance report. (CA 559, Rule 2-560) Without valid reports the layoff could not proceed. (CA 259-60) The report indicates its purpose, such as discharge or layoff, or whatever, and provides a space for the employee to sign and comment. (CA 665-6) Petitioners were not given performance reports. Had they been, they would have had some slight notice that they were going to get viced.

(CA 281) (CA 48, 49, A 3-6, 185, 575) Instead, respondents altered performance reports which had been signed by petitioners for a different purpose the previous year and submitted them to the Department of Personnel for layoff action without telling petitioners. (CA 47-49A 1-2, 696A-C) That made the reports "null and void" under the rules (CA 562) but it also kept the vicing secret until the last minute.

(i) DOT had a policy that persons to be laid off would receive two weeks notice. (CA 553, 623-4) Rhoads implemented the policy. (CA 26C, 553) One reason for the policy was to give certified employees the opportunity to request a transfer to a unit where there might be a vacancy. (CA 16-77, 533)

Petitioners were laid off effective June 30 and did not receive their notices until between Friday, June 29 and Monday, July 2, although they had been selected for vicing by June 7. (CA 139, 616, 628) Rhoads knew petitioners wouldn't get notice before June 29. (CA 46B) In the period June 20 to 29, Hannigan was instructing Rhoads to rescind other individual layoffs. (CA 42E, 686A)

Normally, a transfer wasn't granted until an employee requested it. (CA 204) Petitioner Mathis could have been transferred had he requested it. (CA 146-7) However, he did not receive his notice until Friday, June 29. (A 56v) The only way he then could have qualified for transfer was to have the layoff rescinded. (CA 46C-D)

The layoff notice did not inform petitioners of their rights to a voluntary reduction (*i.e.*, transfer to the 32 new jobs) under the Personnel Rules. (CA 370-A-B, 718-721) When petitioner Holmes requested a voluntary re-

duction after receiving his notice, he was told it was denied because he had not made the request before the layoff took effect. (CA 622) Respondent Jones conceded this procedure made the right meaningless. (CA 334-5) Holmes was seeking the position of a yard man who had retired at the same time. (A 205-7, CA 621) Rhoads denied Holmes's requests on Hannigan's instructions after being told by Hannigan that they couldn't give voluntary reductions. (CA 21-3, 622) However, on July 24, Rhoads approved a voluntary reduction of a maintenance employee in Cook County on a form that was dated to be effective the prior July 1. (CA 686) This was typical of transactions granting voluntary reductions at the time. (CA 43, 43A)

(j) In Unit 922, seven laid-off maintenance workers were on a reemployment list. Six were petitioners and one, a Mr. Fitzpatrick, had been chosen for layoff prior to petitioners because of a poor performance report. (CA 194-5, 633A) When a vacancy arose, the one name Hannigan picked off the list for rehire was Fitzpatrick. (CA 43K, 421-3)

(k) During 1973 and 1974, Hannigan would give Rhoads the names of persons to be appointed in maintenance positions. (CA-11-12) Among these appointments from Hannigan's office was that of a Dean West hired as a Maintenance Lead Worker in one of the units in which a petitioner had been laid off. In addition, this unit adjoined the County where petitioner Lovellette had held exactly the same position. (CA 10, 200-1, 687, A 56a, b, g, h, k, l) West had been a Democratic County Sheriff and was then a Democratic Committeeman. (CA 364-5) Petitioners were given no opportunity for reinstatement.

This is only *some* of the relevant evidence of discrimination against petitioners. However, respondents have an explanation for everything. The point in this case is that the trier of fact, in finding motive and intent, did not credit those explanations. That should be that. In any event, he was not only reasonable, he was right.

5. The District Judge's opinion points out the merits, the importance, and the ramifications in the racial discrimination area of the procedural due process issues which ths case raises. *Compare* App. 27 (administrative due process) *with* App. 28-30 (judicial due process).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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FILED
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No. 80-2088

In the
Supreme Court of the United States
October Term, 1980

LEODA WREN, et al.,
Petitioners,
vs.
NOLAN JONES, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' SUPPLEMENTAL MEMORANDUM

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PETITIONERS' SUPPLEMENTAL MEMORANDUM

Respondents' supplemental memorandum points out that the recent opinion of the Seventh Circuit in *Nekolny* v. *Painter* reverses the anti-*Mt. Healthy* position which that court had previously taken in the present case and in *McGill* v. *Board of Ed. of Pekin Elementary School Dist.*, 602 F.2d 774 (7th Cir. 1979). Now, respondents say, there is "no need . . . to correct the Seventh Circuit . . . ." (Supp.Mem. 2)

Respondents misconceive the issue, which is whether courts across the country which are struggling with the multiple extant versions of the *Mt. Healthy* rule shall

receive an authoritative statement which clarifies the conflicting motivation and burden shift notions that are currently confusing this kind of First Amendment litigation. The hash the Seventh Circuit made out of these concepts in the opinion below is a good example of the national muddle. *Mt. Healthy's* outlines have been scraped away like the back of a major league batter's box by the fourth inning. See the 156 *Mt. Healthy* cases collected at pages 62-72 of our appendix.

The anti-*Mt. Healthy* rule is still alive in the Seventh Circuit. *Nekolny* does not overrule or even mention the present case or *McGill*. More muddle.

Another petition for certiorari praying clarification of the *Mt. Healthy* rule is now pending. *Bullard Independent School Dist.* v. *Brown*, No. 80-2000.

Our petition for certiorari contained an erroneous citation. At page 21 we said "Rhoads admitted at trial there was no justification for what he did." The correct record citation for that statement is CA 49 A11-A12.

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PETITIONERS' APPENDIX

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 79-2254, 79-2324, 80-1131, 80-1132

CECIL WREN, ET AL.,
Plaintiffs-Appellees-Cross Appellants,

v.

NOLAN JONES, ET. AL.,
Defendants-Appellants-Cross Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Springfield Division.

No. S-CIV-73-204—J. WALDO ACKERMAN, *Judge.*

ARGUED JUNE 6, 1980—DECIDED DECEMBER 10, 1980

Before SWYGERT, CUDAHY, *Circuit Judges,* and GRANT, *Senior District Judge.**

PER CURIAM. This case involves allegations that twenty-six employees of the State of Illinois were discharged for political reasons in violation of their right to free association, due process and eqaul protection as guaranteed by the First and Fourteenth Amendments.

Plaintiffs are twenty-six state employees who, according to defendants, were necessarily "laid off;" twenty-five

* Honorable Robert A. Grant, Senior District Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

from the Illinois Department of Transportation (IDOT), and one from the Illinois Department of Mental Health (DMH). Defendants are either current or past officers or employees of the IDOT, DMH or Illinois Department of Personnel (IDOP).[1]

I. Background

In 1969, a lawsuit captioned *Bradley, et al.* v. *Cellini, et al.*[2] was filed in an Illinois State Circuit Court. The *Bradley* case was a mandamus action by former employees who had been discharged in May of 1969 from the IDOT and DMH. In November of 1968, Miriam Ringo, the Director of Personnel under the administration of Governor Shapiro, a Democrat, had extended civil service protection, formally called Jurisdiction B of the Personnel Code, to the positions occupied by the *Bradley* plaintiffs. However, in January 1969, Richard B. Ogilvie, a Republican, became Governor, and in February of 1969 his Director of Personnel expunged former Director Ringo's extension of Jurisdiction B. Between April and June 1969, all Democratic employees in the IDOT maintenance and traffic units, approximately 3,000 workers, were discharged as "not acceptable to the agency" and were replaced by Republican workers. Twenty-five of the plaintiffs in the suit here before us were members of this group of discharged workers. On the other hand, the *Bradley* plaintiffs

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[1] Langhorne Bond, individually and as former Secretary to IDOT; the present Secretary of IDOT, John Kramer; the former administrative assistant to Bond, Brian Hannigan; IDOT District 9 assistant district engineer, Richard Miley; IDOT District 9 business manager, Donald Shelton; the former Director of IDOP, Nolan B. Jones; the present Director of IDOP, William R. Boys; IDOP chief field officer, Robert Rhoads; an IDOP employee, David Knox; the present Director of DMH, Robert deVito; and the former administrative aid to the Director of DMH, Alfred P. Ronan.

[2] Circuit Court of Sangamon County, No. 2795-69.

consisted of 27[3] maintenance and traffic workers from District 9 of the IDOT and three workers from the DMH who had been terminated by the Ogilvie administration.

On April 9, 1973, Illinois Circuit Judge Paul Verticchio issued an opinion holding that the termination of the *Bradley* plaintiffs was without cause, and contrary to the Personnel Code, as well as in violation of the rules of the Department of Personnel. Judge Verticchio thereupon held that the Ogilvie administration's expungement of the Jurisdiction B extension was "void and of no effect." As part of the court-ordered remedy, the heads of IDOT, DMH and IDOP were directed to:

> restore and return each of the [Bradley] Plaintiffs to the position and title held by such Plaintiff on the date of his discharge from said position or to discharge each Plaintiff in accordance with The Personnel Code and Rules of the Department of Personnel.[4]

That writ of Mandamus, entered May 30, 1973, added that "FAILURE TO DO SO WILL SUBJECT YOU TO PUNISHMENT FOR CONTEMPT OF THIS COURT."

While the *Bradley* litigation was pending, Governor Ogilvie's Director of Personnel on November 28, 1972, once again extended Jurisdiction B protection to the relevant positions. Coming full circle politically, the new Democratic administration of Governor Walker, in November 1973, acting thru their new Director of Personnel and a defendant in the case at bar, again attempted to remove the positions from civil service coverage, but the Illinois Civil Service Commission refused to permit the removal. It is apparent that each successive administration, since 1968, has attempted to remove the patronage employees inherited from the former administration, place its own patronage people in those positions, and then to extend civil service coverage to its own new employees.

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[3] One of the plaintiffs chose not to return.

[4] Judgment Order filed May 3, 1973 in Circuit Court, Sangamon County, No. 2795-69.

In June of 1973, the State of Illinois was experiencing financial restrictions for fiscal year 1974 (July 1, 1973-June 30, 1974). The actual amount approved by the legislature for personnel services in the IDOT's Maintenance and Traffic Units was significantly smaller than had been requested.[5] Consquently, approximately 1,000 state employees were laid off in June 1973, 540 of whom were IDOT employees. In this restrictive fiscal setting,[6] the defendant State officials were faced with the *Bradley* court's mandate to reinstate twenty-five workers, or face the possible consequences of punishment for Contempt of the Sangamon County Circuit Court.

II. Implementation

Under the *Bradley* order, the officials in charge of the IDOT and DMH were then confronted with the specter of having 50 employees to do work formerly performed by 25 employees. They determined that it was necessary to layoff a number of employees equivalent to the number of those returning *Bradley* plaintiffs. The parties have stipulated that but for the entry of the *Bradley* order, none of the plaintiffs in the case at bar were scheduled to be laid off for the fiscal year ending June 30, 1973. In selecting those employees for "lay off," the defendant Robert Rhoads, the Field Officer of the IDOP, made the initial determination that those persons who actually replaced the *Bradley* plaintiffs in 1969 should be chosen. After consultation with Berwyn Hanley, an assistant to the Director of Personnel at the IDOPs' downtown Springfield office; with Brian Hannigan, Assistant Secretary of the IDOT; Michael Waters, who served as liaison between the IDOP and the Illinois Attorney General's

[5] Approximately 10.4% below the proposed budget.

[6] Although the district court made the general conclusion that "defendant's evidence does not establish to my satisfaction, that fiscal restraints required the layoff of a number of current employees equivalent to the number of *Bradley* plaintiffs", 457 F. Supp. at 243, as developed below, we hold that finding to be clearly erroneous.

office; and Assistant Attorney General Lee Martin, the layoffs were implemented in the following fashion: in the IDOT, 15 persons who directly replaced the *Bradley* plaintiffs were found to still be in the positions formerly held by the *Bradley* plaintiffs; six persons were replacements for men who had actually replaced the *Bradley* plaintiffs in 1969; and, in four instances where the position could not be identified precisely, persons were laid off on a random basis from the returning *Bradley* plaintiffs' team section and class, with consideration given to performance. In the DMH, the last person hired was laid off. Thereafter these twenty-six employees (the Wren plaintiffs) filed the present action for damages and injunctive relief under 42 U.S.C. §1983, alleging violation of their rights under the First and Fourteenth Amendments. The case was tried without a jury and during trial the defendants agreed to reinstate the plaintiffs pending final adjudication of the case. On August 4, 1978 the district court entered its Memorandum Order[1] finding that defendants had violated plaintiffs' Due Process and First Amendment rights and ordering the then incumbent agency heads, Kramer, Boys, and deVito, to reinstate the plaintiffs. The district court also found defendants Hannigan and Rhoads were individually liable to the plaintiffs discharged from the IDOT for violation of their First Amendment rights, but the court reserved judgment on the same question as to defendants Bond, Miley and Shelton. The court dismissed defendants Jones, Knox, and Ronan. On September 17, 1979, the district court entered an order assessing approximately $393,000 in damages against Rhoads and Hannigan, in addition to costs and attorney fees.

Defendants Hannigan and Rhoads have appealed the award of damages and defendants Boys, Kramer and deVito have appealed the reinstatement order. Plaintiffs have cross-appealed the dismissal of defendants Jones, Knox and Ronan as well as the failure to award overtime

[1] Reported at 457 F.Supp. 234.

damages and the allocation of attorney fees. The State of Illinois, although not a party, has been permitted to file a brief as Amicus Curiae, wherein the arguments of defendants are supported.

III. First Amendment

As in the court below, plaintiffs present two First Amendment arguments. First, that their separation from State service was in furtherance of a patronage program, violating their right to free association under the rationale of *Elrod* v. *Burns*, 427 U.S. 347 (1976) and *Illinois State Employees Union, Council 34* v. *Lewis*, 473 F.2d 561 (7th Cir. 1972) *cert. denied*, 410 U.S. 928 (1973). Secondly, plaintiffs assert that defendants denied them re-employment opportunities in furtherance of a patronage program.

Initially, we will review those cases that have addressed the conflict between political patronage and the First Amendment.

In *Illinois State Employees Union, Council 34* v. *Lewis*, *supra*, a group of state employees who held non-civil service, non-confidential positions were discharged by a new Republican Secretary of State in conjunction with the Ogilvie administration. The discharged employees sought reinstatement and backpay, alleging violation of the First and Fourteenth Amendments. The district court, however, entered summary judgment for the defendant state officials. In reversing and remanding for further proceedings, then Circuit Judge, now Justice Stevens, held that the dismissal of non-civil service public employees due to their political association or beliefs constitutes a violation of the First and Fourteenth Amendments. Judge Stevens commented on the burden of proof involved when First Amendment rights are partially curtailed:

> If the conditions attached to public employment merely involve some curtailment—as opposed to abject surrender—of First Amendment rights, interests of the State "if strong enough" may justify the condi-

tion. As a procedural matter, the burden of establishing such justification rests upon the defendant. In view of the importance which the Court has consistently attached to the First Amendment rights of the citizenry, that burden is a heavy one. Without such justification, the foregoing cases demonstrate that plaintiffs have alleged an impermissible basis for their discharge. We must therefore consider the matter of justification. (footnotes omitted)

473 F.2d 561 at 572-73. The majority vote on the *Lewis* panel came from Senior District Judge Campbell who filed a concurring opinion wherein he stated a much more restrictive allocation of the burden of proof:

Another vexing and potentially troublesome problem which emerges from our ruling concerns the practical application of the burden of proof standard. It goes without saying, of course, that the burden belongs to and remains with the dismissed employee. It seems equally clear that since a civil service system may not be judicially imposed upon a state or local government, that a public employer cannot be compelled to explain the reasons for termination. Indeed, the imposition of such a "burden of explanation" would run counter to the precise holding of the Supreme Court in *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Thus, if a public employer desires to stand silent by way of a general denial to the employees' allegations, the employee must demonstrate by the clear and convincing weight of the evidence that his dismissal resulted solely because of his political associations. Such a burden is a heavy one but in my view is necessitated by the limited nature of the right *Sindermann* compels us to recognize today—i.e., the right to be free from summary dismissal only where the dismissal is based solely upon a reason expressly proscribed by the First Amendment to the Constitution.

473 F.2d at 579.

In *Burns* v. *Elrod*, 509 F.2d 1133 (7th Cir. 1975), Republican deputy sheriffs brought suit for injunctive and other relief against the newly elected Democratic sheriff alleging they had been discharged in violation of the First Amentment, for the sole reason that they were not affiliated with or sponsored by the Democratic party. The district court denied their motion for preliminary injunction and dismissed the complaint. In reversing, this court, in an opinion by Senior District Judge Campbell, relied on *Lewis*, stating, "Although defendants argue that *Lewis* was wrongly decided and invite our reconsideration thereof, we decline to do so for the scholarly and persuasive reasons articulated in Judge Stevens' opinion in *Lewis*" (footnotes omitted). 509 F.2d 1133, 1135. This statement could be interpreted as a change in Judge Campbell's position on the burden of proof, although that burden of proof was not addressed in the *Burns* v. *Elrod* opinion. In *Elrod* v. *Burns*, 427 U.S. 347 (1976), a plurality of the Supreme Court affirmed the Seventh Circuit in an opinion by Justice Brennan[8] which held that public employment, even when viewed as a privilege rather than an inherent right, cannot be conditioned on the surrender of constitutionally protected rights, i.e., that the practice of patronage dismissals imposes an unconstitutional condition on the exercise of the freedom of political association and belief. Justice Brennan, in attacking patronage practices in general, applied a high level scrutiny standard to determine whether a significant impairment of these First Amendment freedoms could be justified by countervailing state interests, expressly rejecting a rational basis analysis. 427 U.S. at 362.

Justice Brennan summarized:

> In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that

[8] Justice Brennan was joined by Justices White and Marshall.

> is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights. (footnote omitted).

427 U.S. at 363.

The majority votes in *Elrod* came in Justice Stewart's concurrence[9] which expressed no view on the question of political hiring, and the consideration of patronage dismissals was limited:

> The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot. See *Perry* v. *Sindermann*, 408 U.S. 593, 597-598.

427 U.S. at 375.

In *Branti* v. *Finkel*, 100 S.Ct. 1287 (1980), the Court, in a majority opinion by Justice Stevens[10] reaffirmed the plurality opinion in *Elrod*. *Branti* involved two assistant public defenders in Rockland County, New York, who sought an injunction to preserve their positions as assistant public defenders on the basis that the recently appointed Democratic County Public Defender was about to discharge them solely because they were Republicans. The district court permanently enjoined their termination, based as it was, upon the sole grounds of political belief, finding that the newly appointed Public Defender intended to replace the complaining assistants with Democrats. Both the Second Circuit and the Supreme Court affirmed. Justice Stevens, writing for the majority, stated:

> If the First Amendment protects a public employee from discharge based on what he has said, it must

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[9] Justice Stewart was joined by Justice Blackmun.

[10] Justice Stevens had not participated in the Seventh Circuit *Elrod* decision.

> also protect him from discharge based on what he believes. Under this line of analysis, unless the Government can demonstrate "an overriding interest," [citing *Elrod*] 427 U.S. at 368, 96 S.Ct. at 2687, "of vital importance," *id.* at 362, 96 S.Ct. at 2684, requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment. (footnote omitted).

100 S.Ct. at 1293.[11]

In all of the cases discussed above, the underlying fact was that the employees were or were about to be discharged solely on the basis of their political beliefs. In the case at bar, the initial inquiry must be whether the political association and beliefs of the Wren plaintiffs were the sole basis of their layoffs. The short and simple answer must be that the unusual facts of this case preclude a finding that there was such a sole basis. As the defendants point out, the *Bradley* order itself makes this case unique. In view of the fiscal restrictions, the fact that there were only Republicans in the affected units and the further fact that no Democrats were hired into similar full-time positions, requires a conclusion that any potential motivation was, at most, just one of the factors in their decision.

The issue now becomes: how much of a role must the plaintiffs' political association have played in the defendants' decision to engage in the layoffs in order to find a First Amendment violation. The district court answered that question and allocated the burden of proof by quoting the following passage from *Mt. Healthy City School District Bd. of Ed.* v. *Doyle*: 429 U.S. 274, 287 (1977).

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was

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[11] *Branti* dealt with the question of whether certain employees had a confidential relationship with the employer which would justify a patronage dismissal. Such a factual question is not present in the case at bar.

> constitutionally protected, and this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" [footnote omitted] in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

Mt. Healthy involved an action brought by an untenured school teacher who claimed that a school board's refusal to renew his contract violated his First Amendment rights contending that his exercise of free speech had played a substantial role in the decision not to rehire. While the plaintiff prevailed on that theory in the district and circuit courts, the Supreme Court vacated and remanded the case for application of the above-quoted test. In explaining what the Court meant by "motivating factor," the case of *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252 (1977) was cited. *Arlington Heights* did not involve a First Amendment challenge, but rather concerned an allegation that refusal to change the zoning of land to permit construction of racially integrated housing, violated the Equal Protection Clause. The court of appeals had reversed the district court, holding that the Village's refusal to rezone carried a racially discriminatory effect and was, without more, unconstitutional. In reversing, the Supreme Court commented on the role a racially discriminatory motive must play before a violation of the Equal Protection Clause will be proved:

> Our decision last Term in *Washington* v. *Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.* at 242, 96

S.Ct. at 2049. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.

* *

Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified. (footnotes omitted).

429 U.S. at 264-266.

In summation, the Supreme Court stated:

Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. This conclusion ends the constitutional inquiry.

429 U.S. at 270-271.

In *Givhan* v. *Western Line Consol. School Dist.*, 99 S.Ct. 693 (1979), the Court commented on its *Mt. Healthy* holding. *Givhan* involved a dismissed school teacher who sought reinstatement, partially on the grounds that her right of free speech had been infringed. Specifically, she had made comments on employment policies and practices at the school which she believed to be racially discriminatory. The Fifth Circuit reversed a district court finding that the dismissal violated the teacher's First Amendment rights. The Supreme Court, in reversing and in

clarifying that its *Mt. Healthy* holding covered private communications between teacher and principal, first reviewed another case in which the Court faced the question of whether a public employee's exercise of free speech was protected. The *Givhan* Court recounted a balancing test used in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968):

> In *Pickering* a teacher was discharged for publicly criticizing, in a letter published in a local newspaper, the school board's handling of prior bond issue proposals and its subsequent allocation of financial resources between the school's educational and athletic programs. Noting that the free speech rights of public employees are not absolute, the Court held that in determining whether a government employee's speech is constitutionally protected, "the interests of the [employee], as a citizen, in commenting upon matters of public concern" must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education, supra*, 391. US. at 568, 88 S.Ct. at 1734.

99 S.Ct. at 696. The *Givhan* Court further restated its test set down in *Mt. Healthy* and remanded the case for application of this test:

> In that case [*Mt. Healthy*] this Court rejected the view that a public employee must be reinstated whenever constitutionally protected conduct plays a "substantial" part in the employer's decision to terminate. Such a rule would require reinstatement of employees that the public employer would have dismissed even if the constitutionally protected conduct had not occurred and, consequently, "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." 429 U.S. at 285, 97 S.Ct. at 575. Thus, the Court held that once the employee has shown that his constitutionally protected conduct played a "substantial role in the

> employer's decision not to rehire him, the employer is entitled to show "by a preponderance of the evidence that it would have reached the same decision, as to [the employee's] reemployment even in the absence of the protected conduct. *Id.* at 287, 97 S.Ct. at 576.
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> • • •
>
> Since this case was tried before *Mt. Healthy* was decided, it is not surprising that respondents did not attempt to prove in the District Court that the decision not to rehire petitioner would have been made even absent consideration of her "demands." Thus, the case came to the Court of Appeals in very much the same posture as *Mt. Healthy* was presented in this Court. And while the District Court found that petitioner's "criticism" was the "primary" reason for the school district's failure to rehire her, it did not find that she would have been rehired but for her criticism.

99 S.Ct. at 697. Although the *Mt. Healthy* test was to be applied on remand in *Givhan,* the Second Circuit has recently decided that, at least in some instances, they prefer to apply the *Pickering* balancing test rather than the *Mt. Healthy* test. *Janusaitis* v. *Middlebury Volunteer Fire Dept.,* 607 F.2d 17, 25 (2d Cir. 1979).

In *Rosaly* v. *Ignacio,* 593 F.2d 145 (1st Cir. 1979), the First Circuit, facing a factual situation somewhat akin to the case at bar, applied the *Mt. Healthy* and *Givhan* holdings. In *Rosaly,* employees of the Puerto Rico Highway Authority alleged that their terminations were politically motivated, in violation of the First Amendment. The terminations occurred after the New Progressive Party lost the 1972 elections to the Popular Democratic Party. After a verdict and judgment for plaintiffs, the First Circuit reversed, holding that defendant officials must be given the opportunity, under the *Mt. Healthy* test, to prove that the terminations were necessitated by a financial crisis in the Highway Authority and were not due to their political affiliation:

The defendants maintained throughout the proceedings that the plaintiffs' terminations were necessitated by a financial crisis in the Highway Authority and were not due in any way to their political affiliation. This, then, was a *Mt. Healthy* claim. The court did not adequately treat this issue. It included in its findings of fact plaintiffs' compilation of employee statistics which indicated that after plaintiffs' discharges the Department of Transportation granted a number of raises and promotions. We acknowledge that circumstantial evidence may be used to show discriminatory motive in a patronage dismissal case. *Gabriel* v. *Benitez*, 390 F.Supp. 988, 993 (D.P.R. 1975), aff'd sub nom., *Rivera Morales* v. *Benitez de Rexach*, 541 F.2d 882 (1st Cir. 1976). However, the recital of these numbers alone does not establish conclusively a discriminatory motive, especially in light of the defendants' alleged economic justification for these increases, i.e., two of the employees who received salary increases did so because these employees took on additional duties after the integration, resulting in an overall savings in the department. But even if such evidence supports a finding of discriminatory motive, there was, as far as the record shows, no application of the *Mt. Healthy* test.

Although the record is lengthy, we do not feel that it provides the proper basis for us to make the factual determination called for in *Givhan, supra*, ... U.S. at ....., 99 S.Ct. 693. The *Givhan* decision adopted the procedural guidelines set out in *Mt. Healthy, supra*, 429 U.S. at 287, 97 S.Ct. 568, but articulated more precisely the test to be applied. Under *Givhan*, the initial burden is upon plaintiffs to show that their conduct was constitutionally protected. Plaintiffs must next establish that this conduct was a "substantial factor" or a "motivating factor" in defendants' decision to discharge them from the Highway Authority.

> If that is proven, the defendants have the burden to show by a preponderance of the evidence that they would have reached the same decision notwithstanding the protected conduct. If the plaintiffs are to recover, the court (or jury) must expressly find that plaintiffs would not have been discharged "but for" the constitutionally immunized activity. *Givhan, supra,* ..... U.S. at ....., 99 S.Ct. 693. See *Mack* v. *Cape Elizabeth School Board,* 553 F.2d 720, 722 (1st Cir. 1977).

593 F.2d at 148-149.

In summary, under *Branti* and *Elrod,* if political association appears to be the sole basis for dismissal, then a strict scrutiny analysis should be applied. Where, as in the case at bar, political association was not the sole basis for a personnel transaction, the *Mt. Healthy* test should be applied to determine whether political affiliation was the motivating factor as defined in *Village of Arlington Heights.* However, as seen in *Givhan* and *Janusaitis,* applicaion of the *Pickering* balancing test remains a possibility.

Applying the *Mt. Healthy* test, as restated in *Rosaly, supra,* plaintiffs' "conduct" was simply their membership in the Republican party, and such political association is clearly constitutionally protected. However, the crucial burden is upon the plaintiffs to show that this conduct was the motivating factor in the layoff decision. Here we must determine whether the district court's finding that such conduct was the motivating factor is clearly erroneous. We now hold, from a review of the testimony and other evidence before the district court, the finding that plaintiffs have satisfied their burden of proving that political affiliation was the motivating factor in their discharge is clearly erroneous. To paraphrase the Supreme Court, plaintiffs have simply failed to carry their burden, and this conclusion must end the constitutional inquiry. Assuming *arguendo,* that plaintiffs have satisfied the first part of the *Mt. Healthy* test, we find that the defendants have, by a preponderance of

the evidence, established that fiscal restraints required a reduction in the affected units equivalent to the number of reinstated in *Bradley* employees, and that fiscal restraints justified the failure to reemploy the plaintiffs during the two year period after their layoffs. Therefore, although the same employees may not have been chosen, for example, had actual hire dates been used rather than the common seniority date of May 1, 1972,[12] the fact would remain that some of the employees in the affected units would have to be laid off. The fact that all potentially affected employees were Republican means that the Wren plaintiffs' political association was of no consequence, especially in light of the fact that no Democratic employees were hired into similar full-time positions in the same class[13] during the two year period following the dates of the layoffs.

If we were to apply the *Pickering* balancing test in this case, we must balance the slight (if existent) infringement of the Wren plaintiffs' First Amendment right to free political association versus the State's clear interest in promoting the efficiency of the public services it performs through its public employees. Unlike a discharge motivated by a school teacher's overt exercise of her right to free speech, *e.g.*, *Givhan*, and unlike the blatant firing of employees of the same political party as a defeated incumbent, upon change in office, *e.g.*, *Branti*, the Wren plaintiffs were Republicans chosen from a larger group that consisted solely of Republicans and there was no evidence adduced that the plaintiffs had engaged in any political speech or association, other than their being registered Republicans, which had given rise to the personnel actions. The intrusion upon the Wren plaintiffs' First Amendment freedoms was minimal, if existent.

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[12] The date when civil service protections were extended to employees in the affected units.

[13] We are not persuaded that summer junior laborers or "ghost employees" are in the same class as the Wren plaintiffs.

Even assuming that there was a minimal intrusion, evaluating the State's interest to determine whether they are of greater weight, as stated before, the State has a clear interest in utilizing its financial resources in an efficient manner. In the final analysis, that is what this case comes down to, whether the State of Illinois should have employed the *Bradley* plaintiffs without any equivalent reduction in personnel. In view of the involuntary requirement that the *Bradley* plaintiffs be reinstated, and of the fiscal exigencies, we hold that the State's interest in maintaining prudent control over the efficient use of their resources outweighs and minimal impact on the plaintiffs' right to political association.

At this point, we should comment on the district court's heavy reliance on the history of patronage in Illinois politics. Although historical background is a proper factor in determining present motivation, *e.g.*, *Arlington Heights, supra,* at 267, we believe that too great an emphasis was placed on this factor, and we are not persuaded that the political maneuverings of previous administrations, and even previous maneuverings of some of the Wren defendants, can be said to be the reason for the personnel actions here contested.

IV. Due Process

The following procedures were utilized in the case at bar. On or about June 30, 1973, plaintiffs received notices of their layoffs which read: "Layoff occasioned by Judge Verticchio's order in No. 2795-69 in the Circuit of Sangamon County." Under the Personnel Rules, each plaintiff was entitled as a laid off certified employee to petition the Director of Personnel within 15 days of receipt of the layoff notice for a reconsideration of his decision approving the notice. As part of that procedure, the Director was required to "review and investigate the application of the personnel rules and validity of the layoff." Personnel Rule 2-596. Written notice to the employee of the final decision of the Director was required.

In the case at bar, defendants at first were confused about the jurisdiction of the IDOP to review the layoffs here because the actions occurred as the result of a court order. Some of the men laid off filed a mandamus action in the Circuit Court for Sangamon County seeking reinstatement. However, there was testimony to the effect that meetings were being scheduled as part of the reconsideration procedure for all of the laid-off employees who requested them. Such a meeting for plaintiff Patterson was held on September 28, 1973. Defendant Jones upheld Patterson's layoff and sent written notice of his decision to Patterson's attorney. No other meeting had been held when this action was commenced on October 18, 1973, and the parties stipulated that none would be held.

In finding that there was a violation of plaintiffs' due process rights which justified injunctive relief, the court below stated:

> Under the unique circumstances of this case, I believe that plaintiffs' rights to due process of law were violated. The defendants' response to the *Bradly* order, and the manner in which *Bradley* was implemented established the plaintiffs here as necessary parties to the *Bradley* litigation. They were not made party and thus were unable to protect the interest they had in their employment. They were denied due process of law.

457 F. Supp. at 239.

Plaintiffs contend here, as in the trial court, that, as certified employees they had a property interest protected by due process, that this property interest could not be terminated without adequate notice and a prior hearing, and that the prior hearing to which they were entitled was either a judicial hearing in the context of being parties to the *Bradley* case itself, a predismissal administrative hearing, or the discharge proceedings provided under the Illinois Personnel Code.

Initially, we hold that the district court erred in finding that the Wren plaintiffs were necessary parties to the *Bradley* proceeding, and that they were denied due process by not being joined. During the four year history of the *Bradley* proceeding, it would have been impracticable to join as parties every possible employee who might have been affected by the *Bradley* order. There would have been hundreds of potentially affected workers, with no certain way of determining which, if any, would have to be laid off. *Cordes* v. *Isaacs*, 27 Ill. 2d 383, 189 N.E.2d 236 (1963), stands for the proposition that incumbent employees are not necessary parties to a proceeding for reinstatement of a former employee if the reinstatement proceeding would not adjudicate the employment rights of the incumbents. Such is the case here, in that the employment rights of the Wren plaintiffs were not adjudicated in the *Bradely* proceeding. Only upon implementation by the defendant State officials did the *Bradley* order first affect the Wren plaintiffs. In *Powell* v. *Jones*, 56 Ill. 2d 70, 305 N.E.2d 166 (1973), the Illinois Supreme Court held that an employee discharged for cause is entitled to more extensive procedures (*e.g.*, Ill. Rev. Stat. Ch. 127, 63b111) than is an employee laid off for financial reasons (*e.g.*, Personnel Rules 2-596). The *Powell* court described the post-layoff procedures that are available in cases such as the one at bar, and held that ordinarily there is no right to a hearing before a layoff. This court has previously followed the *Powell* decision. *Mims* v. *Board of Education*, 523 F.2d 711, 715 (7th Cir. 1975). We note that the *Powell* court specifically limited its holding to situations that did not involve allegations of political motivation. 56 Ill. 2d at 74, 305 N.E.2d at 168. However, where political allegations have been found to be without merit, we will not grant relief for failure to provide a pre-layoff hearing. We hold that no pre-layoff hearing was required. In so ruling we are mindful of the limited rule a federal court must take in judging the procedures afforded a state employee in personnel transactions. *Bishop* v. *Wood*, 426 U.S. 341 (1976).

V. Conclusion

We find no merit in plaintiffs' equal protection and substantive due process argument, and our decisions above moot the issues raised in plaintiffs' cross-appeal.

REVERSED AND REMANDED to the District Court for further proceedings in accordance with this opinion.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT

December 10, 1980.

This cause was heard on the record from the United States District Court for the Southern District of Illinois, Springfield Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED AND REMANDED, in accordance with the opinion of this court filed this date Each party is to bears its own costs on appeal.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 79-2254, 79-2324, 80-1131, 80-1132

CECIL WREN, ET AL.,

Plaintiffs-Appellees-Cross Appellants,

v.

NOLAN JONES, ET AL.,

Defendants-Appellants-Cross Appellees.

ORDER DENYING REHEARING

March 12, 1981

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing.

Accordingly, IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 79-2254, 79-2324, 80-1131, 80-1132

CECIL WREN, ET AL.,

Plaintiffs-Appellees-Cross Appellants,

v.

NOLAN JONES, ET AL.,

Defendants-Appellants-Cross Appellees.

ORDER

April 30, 1981

The Court ORDERS, *sua sponte,* that its opinion of December 10, 1980, is hereby AMENDED to the following extent:

> On page 18 of the slip opinion, the last line of the page, which previously ended with "none would be held." is hereby amended to read "none would be held during the pendency of this litigation."

On page 20, the line "We hold that no pre-layoff hearing was required." is amended to include footnote number 14, the text of which is included below.

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[14] Plaintiffs-appellees claim they were denied the right to post-layoff hearings, and request that these hearings be resumed or damages awarded for this failure. We do not reach or consider these contentions, leaving it to the informed discretion of the trial judge to determine what further proceedings, if any, are required.

APPENDIX B

Cecil WREN et al., Plaintiffs,

v.

Nolan JONES et al., Defendants.

No. S-Civ-73-204.

United States District Court,

S. D. Illinois, S. D.

Aug. 21, 1978

[236] MEMORANDUM ORDER

J. WALDO ACKERMAN, District Judge.

This action arises out of the separation of twenty-six workers from State employment. The issue of liability has been tried to the Court, sitting without a jury; has been fully and ably briefed by the parties, and is now ripe for decision. This Memorandum Order shall incorporate within its text the necessary findings of fact and conclusions of law pursuant to F.R.Civ.P. 52(a).

Plaintiffs' complaint is based on 42 U.S.C. § 1983. Jurisdiction is based on 28 U.S.C. § 1343. The briefs and arguments of the parties present a great many issues, but those issues can generally be broken down into four basic categories. The first three are distinguished by the constitutional provision alleged to be violated, the first amendment, the due process clause, and the equal protection clause. The fourth area concerns itself with the availability to defendants of certain defenses and arises only upon finding that one of the plaintiffs' constitutional rights were in fact violated. These defenses concern qualified immunity and good faith. Because I find for plaintiffs on the due process and first amendment issues, little discussion of the equal protection questions is required and this opinion will deal primarily with the due process, first amendment and individual liability issues.

I. Facts

Each of the twenty-six plaintiffs claims to be certified employees within Jurisdiction B (ch. 127, Ill.Rev.Stat. §§ 63b108b *et seq.*) of the Illinois Personnel Code. Ch. 127, Ill.Rev.Stat. §§ 63b101 *et seq.* Twenty-five of the twenty-six plaintiffs were employed in maintenance positions in the Illinois Department of Transportation (DOT). The twenty-sixth plaintiff, Claris D. Barger, was employed as a maintenance equipment operator at the Anna State Hospital in the Illinois Department of Mental Health (DMH). Each of the plaintiffs passed the required qualifying exams and successfully completed necessary probationary periods.

On or about June 30, 1973 each of the plaintiffs was separated from State employment by a personnel transaction denominated as a layoff. The reason for the layoff on the official notice received by each plaintiff was as follows:

> Layoff occasioned by Judge Verticchio's order in No. 2795-69 in the Circuit Court of Sangamon County.

The case mentioned in the layoff order is *Bradley et al.* v. *Cellini et al.* (Circuit Court of Sangamon County No. 2795-69). The *Bradley* case was a Mandamus action filed in the Courts of Illinois by former employees who had been discharged in May of 1969, from the Illinois Departments of Transportation and Mental Health.

Illinois Circuit Judge Paul C. Verticchio found that the plaintiffs in that case had been discharged without cause and contrary to the Illinois Personnel Code as well as in violation of the rules of the Department of Personnel.

Judge Verticchio ordered that each of the *Bradley* plaintiffs be restored and returned to the position and title held by them on the date of discharge or in the alternative, that they be discharged in accordance with the Personnel Code and Rules. A writ of Mandamus

then issued in aid of the judgment order. The writ was directed to the agency heads involved in the original action, Langhorne Bond, Secretary of Transportation, LeRoy P. Levitt, Director of Mental Health and Nolan B. Jones, Director of Personnel.

[237] Upon receipt of the *Bradley* order, Robert D. Rhoads, Chief Personnel Officer, Field Services Division, Illinois Department of Transportation, contacted Michael Waters, Berwyn Hanley and Robert Boyd, all of the Department of Personnel as well as Brian Hannigan, Assistant to the Secretary of the Department of Transportation, to determine how to comply. This group determined that since no reason to discharge the *Bradley* plaintiffs existed, they would have to be restored to their former position and title. They also determined that a like number of then current employees would have to be laid off. Those persons subsequently laid off are plaintiffs here.

Before reaching the method used to separate plaintiffs from State service, it is necessary to put in historical perspective the positions they held. These positions for many years prior to 1968, were political patronage positions. In November of 1968, Mariam Ringo, Director of Personnel, under the administration of Governor Shapiro, a Democract, extended Jurisdiction B of the Personnel Code to the positions, removing their patronage character. In February of 1969, however, the Director of Personnel, J. Conrad Vanden Bosch, under the administration of Governor Richard B. Ogilvie, a Republican, ordered that the extension of Jurisdiction B made in 1968, was void and that any act taken under it be expunged. On November 28, 1972, the Director of Personnel, Allen Drazek, under the administration of Governor Ogilvie, once again extended Jurisdiction B to these same positions. At a later time, the Director of Personnel, Nolan B. Jones, under the Democratic administration of Daniel Walker, again sought to make these positions exempt from the provisions of Jurisdiction B. But in a hearing before the Illinois Civil Service Commission, the order of Director Jones was invalidated.

From this history it is apparent that the positions in question were at one time patronage positions and that each successive administration since 1968, has sought to remove the holdover patronage employees from the former administration, place its own patronage people in those positions, and extend Civil Service protection to the new employees.

Both the *Bradley* plaintiffs and the plaintiffs here freely admit that they were originally hired as patronage employees. The *Bradley* plaintiffs were employed sometime prior to December of 1968. Jurisdiction B was extended to them by Director Ringo's order and removed by Director Vanden Bosch's order. The plaintiffs here, were employed after Director Vanden Bosch's order and had Jurisdiction B extended to them by the order of Director Drazek.

In the *Bradley* case, Judge Verticchio ruled that Director Vanden Bosch's order which in effect, invalidated Director Ringo's order, was itself invalid, and required the *Bradley* plaintiffs reinstated or discharged in accordance with the personnel rules.

The original decision of Judge Verticchio was entered on April 9, 1973. The actual manner of implementing Judge Verticchio's order was not, however, considered until approximately June 1, 1973. At that time, it was determined that it was necessary to separate a like number of current employees to make room for the returning *Bradley* plaintiffs. In selecting those persons for separation, the defendant Robert Rhoads, the Field Officer of the Personnel Department made the initial determination that the dpartment should terminate those persons who had actually "viced or replaced" the *Bradley* plaintiffs in 1969.

This intent was carried out in the Department of Transportation by separating 15 of plaintiffs here who were persons who had actually replaced *Bradley* plaintiffs in 1969. Those employees are Caldwell, Brooks, Dickson, Wren, R. Peeler, Lovellette, Casey, Simmons, Betts, Pat-

terson, Potter, Etheridge, Wenzel, Johnson, and W. Peeler. Further, in the Department of Transportation, plaintiffs Kommer, Linder, Holmes, Meinders, Sisk, and Cochran, were replacements for men who had actually replaced the *Bradley* plaintiffs in 1969 and were separated on this basis. Plaintiffs Atkins, Jenkins, Harper, and Mathis were also separated [238] from the Department of Transportation but had neither replaced a *Bradley* plaintiff nor succeeded a *Bradley* plaintiff replacement.

In the Department of Mental Health, plaintiff Claris Barger was selected for separation on the basis of having the most recent date of hire in the unit.

II. Due Process

[1] Plaintiffs have presented a number of theories bottomed on the due process clause. They argue that defendants violated the due process clause by either, acting arbitrarily and unreasonably in dismissing[1] plaintiffs; by implementing the *Bradley* order to dismiss plaintiffs without plaintiffs being a party to the *Bradley* case; by not giving plaintiffs a pre-dismissal administrative hearing; by denying plaintiffs the protections of the discharge procedures of the Illinois Personnel Code; by failing to give plaintiffs reasonable notice of their dismissal; or by failing to give plaintiffs a plenary hearing, assertedly required under the unique circumstances of their claims. Be that as it may, the heart of the entire litigation is the *Bradley* case and its implementation.

But for the *Bradley* case none of the plaintiffs here would have been laid off and this case would not have arisen. No clarification or modification of the *Bradley* order was sought. Nor was any appeal taken. In fact, the

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[1] Plaintiffs have argued throughout, that the layoff was but a subterfuge for discharge and that therefore, they were entitled to the discharge procedures under the Illinois Personnel Code. Because of the holding here, I believe it unnecessary to determine whether the layoff was in fact, a subterfuge for discharge.

layoff progressed in an uncommonly swift manner. As defendant Shelton said in his memorandum to file, "[a] damned hectic manner in which to do business."

The syllogism used by defendants to conclude that the layoff here was necessary, seems to be that since;

1. Judge Verticchio ordered *Bradley* people put back to work; and since
2. Employees in those units and classifications had earlier been laid off for fiscal reasons;
3. Therefore, an equivalent number of current employees must be laid off; further,
4. Since the current employees all have the same certification date, the most equitable manner to choose between incumbents with the same seniority is to trace, and layoff those who actually viced or replaced the *Bradley* plaintiffs.

The fact that defendants took some actions required by the Court's order in *Bradley* is no defense to any action taken against plaintiffs here. The plaintiffs were not party to the *Bradley* order and not bound in any way by it. Any indication that Judge Verticchio made as to the proper status of the plaintiffs here could have no effect since they were not parties.

The Verticchio order required only the *Bradley* plaintiffs be reinstated or discharged in accord with the personnel rules, nothing more. The responsibility for any actions beyond reinstatement or discharge of the *Bradley* plaintiffs rests with those who took them. The fact that certain consequences flowed from the *Bradley* order provides no defense. In fact, that causal link, provides substantial support for plaintiffs' due process claims.

[2] Plaintiffs assert that their rights to due process of law were violated either by not being made party to the *Bradley* decision or alternatively, by implementing the *Bradley* decision as they did without plaintiffs being party to *Bradley*. Defendants respond with a number of Illinois cases cited for the proposition that in a mandamus

action for reinstatement, as the *Bradley* case was, the incumbent employee need not be joined unless, the mandamus would *necessarily* adjudicate the employment rights of the incumbent. *See, Cordes* v. *Isaacs,* 27 Ill.2d 383, 189 N.E.2d 236 (1963) and *People ex rel. Coryell* v. *Barrett,* 320 Ill.App. 593, 51 N.E.2d 795 (1st Dist. 1943).

[239] This latter case couples neatly with another argument made by defendants, but I believe the argument proves too much. The *Coryell* Court held that where the plaintiff was a civil service employee and the incumbent was not, the incumbent was not a necessary party required to be joined since the incumbent had no legal entitlement to the position and served only at the pleasure of her employer. Defendants have argued that since the *Bradley* plaintiffs were found in the *Bradley* decision to have been improperly discharged, they were *de jure* employees while their replacements were *de facto* employees. As *de facto* employees, defendants argue, plaintiffs could have been terminated at will and thus had an insufficient property right[2] in their positions to invoke the protections of either the due process or equal protection clause.

It is apparent that notions that the plaintiffs here were improperly hired were utilized to select the majority of the plaintiffs for layoff. They were selected on the basis that they had viced or replaced *Bradley* plaintiffs.

I agree that the plaintiffs here were not necessary parties under Illinois law to the *Bradley* court. However,

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[2] This property right argument has been expanded to assert that plaintiffs here were also not certified employees within Jurisdiction B of the Personnel Code and thus had but a mere expectancy in retaining their employment insufficient to trigger the protections of either the due process or equal protection clauses. Again, this argument only points up the necessity that plaintiffs be made party in the *Bradley* case. Suffice to say, defendants claim that plaintiffs were treated as certified employees throughout the personnel transactions here at issue and will be so treated here.

the facts undisclosed to the *Bradley* court, the fact that an equivalent number of current employees would be laid off and that the majority would be chosen on the basis that they had viced or replaced *Bradley* plaintiffs, made the plaintiffs necessary parties both under Illinois law and the due process clause. The rights of all the plaintiffs here were in fact, necessarily affected by decisions and policies unknown to the *Bradley* court.

The problem of reinstatement of employees and its effect on the employees at work prior to the reinstatement is reoccuring, but one to which the courts have spoken somewhat infrequently. In racial discrimination class actions, where the relief sought would alter the seniority of other union members, the union or the affected members have been held as necessary parties. *English* v. *Seaboard Coast Line Railroad*, 465 F.2d 43 (5th Cir. 1972); *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 301 F.Supp. 663 (N.D.Ill.1969). In other cases, notice has been required to be given to affected employees so as to facilitate intervention. *See, e.g., Meadows* v. *Ford Motor Co.*, 510 F.2d 939, 949 (6th Cir. 1975).

Since there was a direct causal relationship between the *Bradley* order and the layoff of all the plaintiffs here, I believe these plaintiffs had a sufficient stake in the outcome of the *Bradley* litigation to be made parties. Their interests could be adequately protected in no other proceeding. Had Judge Verticchio known of the possible results to the plaintiffs here, known of the results which in fact obtained, he could have ordered the plaintiffs joined, given notice and allowed plaintiffs to intervene or perhaps fashioned other protections for plaintiffs' interests. Such protections could not be formulated, however, because the defendants' actions occurred in response to the *Bradley* order.

Under the unique circumstances of this case, I believe that plaintiffs' rights to due process of law were violated. The defendants' response to the *Bradley* order, and the

manner in which *Bradley* was implemented established the plaintiffs here as necessary parties to the *Bradley* litigation. They were not made party and thus were unable to protect the interest they had in their employment. They were denied due process of law.

This conclusion alone justifies the imposition of injunctive relief. But because of the claims for money damages against individual defendants, I believe I must also reach the first amendment issues.

[240] III. First Amendment

Plaintiffs present two issues asserting violations of plaintiffs' rights under the first amendment. First, plaintiffs assert that their separation from State service was in furtherance of a patronage program, thus violating their rights under the first amendment under the rationale stated in the cases of *Elrod et al.* v. *Burns et al.*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) and *Illinois State Employees Union Council 34* v. *Lewis*, 473 F.2d 561 (7th Cir. 1972), *cert. denied* 410 U.S. 928, 93 S.Ct. 1364, 35 L.Ed.2d 590 (1973). Secondly, plaintiffs assert that defendants denied them re-employment opportunities in furtherance of a patronage program and thus violated plaintiffs' first amendment rights.

[3] Concerning the burden of proof on these issues, Justice Rehnquist, writing for a unanimous Court in *Mt. Healthy City School District Bd. of Ed.* v. *Doyle*, 429 U.S. 274 at 287, 97 S.Ct. 568 at 576, 50 L.Ed.2d 471 (1977), said:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" [footnote omitted] in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence

> that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

Thus, plaintiffs have the burden of proving that their status as Republicans was a substantial or motivating factor in their separation from State service. Thereafter, the burden shifts to defendants to show by a preponderance of the evidence, that the separation would have occurred in absence of plaintiffs' status.

[4] Plaintiffs seek to discharge their burden through a case built almost entirely upon circumstantial evidence and inference. Plaintiffs have not found the "smoking gun" which would establish beyond all question that their status as Republicans was a motivating factor in their separation. Rather, plaintiffs have sought to convince this Court through a totality of the circumstances that their status was a substantial or motivating factor in their separation. They have succeeded.

To begin, it must be remembered that the actions of defendants which plaintiffs argue as raising the inference that plaintiffs' first amendment rights were violated must be viewed against the historical background of the positions. This historical background, alone, raises an inference that the actions taken by defendants here were taken for political reasons. New administrations, both Republican and Democratic, sought to remove holdover patronage workers regardless of protection given their positions by the prior administration, and place their own patronage workers in those jobs. This hisory, when coupled with the aborted attempt of the defendant Nolan Jones to remove the protections of Jurisdiction B from these particular positions, predisposes one to the idea that the actions taken by defendants here are but one more attempt in a long series of such attempts, to replace holdover patronage employees with new patronage people.

Plaintiffs here were Republican patronage workers appointed under the Ogilvie administration. They were separated from State service under the administration of

Daniel Walker, a Democrat. Plaintiffs argue that defendants utilized the *Bradley* order to partially accomplish the ends that the Democratic administration sought to achieve by the attempt to remove Jurisdiction B from the positions entirely. That is, the *Bradley* Order required Democratic patronage workers placed on the State payroll and presented the Democratic administration with the opportunity to terminate a like number of Republican patronage workers. I believe it would be fair to adopt this argument on the basis of the inference that can be drawn of the history of the positions alone. However, plaintiffs have bolstered this inference with a number of actions on [241] the part of defendants which I believe, establish by a preponderance of the evidence, that plaintiffs' political affiliation was a substantial or motivating factor in the personnel action taken against them.

Chronologically, the defendants' response to the *Bradley* case itself, supports the inference that plaintiffs' status was a substantial factor in their separation from State service. Governor Walker's administration was firmly in control at the time that Judge Verticchio found in favor of the former Democratic patronage workers and ordered their reinstatement. No appeal from this order was taken, no clarification was sought, nor was any modification of the order attempted[3] in spite of the fact that five of the *Bradley* plaintiffs were thought physically incapable of performing their duties and it was recommended that the Attorney General's office be contacted to file a motion seeking relief from the *Bradley* order concerning these individuals. These findings and recommendations are contained in a memorandum from one R. L. McCracken to the defendant Robert Rhoads. There was testimony to

[3] To this point in the opinion all the arguments for counsel have been equally applicable to the claims of each individual plaintiff. However, many of the circumstances from which plaintiffs seek to draw inferences are applicable only to happenings in DOT. Plaintiff Claris Barger was at the time of layoff, employed in DMH. His claims will be dealt with separately.

the effect that Mr. Rhoads gave the memorandum to the defendant Brian Hannigan and that Hannigan took no action.

Mr. Hannagan's role in plaintiffs' case is important in several other ways. He was employed at the time as defendant Bond's administrative assistant. His function was to serve as Secretary Bond's representative in all matters concerning personnel management in DOT. He was particularly charged with the duty of assuring the Department's compliance with the *Bradley* order. Prior to his joining State government in January of 1973, Hannigan had been campaign coordinator in the 20th Congressional District for the campaign of Dan Walker for Governor. There was testimony to the effect that it was general knowledge that at the time in question, Mr. Hannigan was in charge of patronage at DOT.

Given Mr. Hannigan's political background, it must be remembered that Hannigan was a member of the group who initially determined that the *Bradley* plaintiffs would have to be reinstated and a like number of current employees laid off. Further, there was testimony to the effect that when defendant Rhodas attempted to get approval for the *Wren* plaintiffs to apply for voluntary reductions as authorized under the personnel code, Hannigan told Rhoads that these requests could not be honored.

Apparently voluntary reductions could only be taken to the positions of summer junior laborer. Those positions had a patronage history and remained patronage through the summers of 1973 and 1974. Apparently the process for obtaining these positions began with Hannigan informing Mr. David Cleverdon, the patronage director in the Governor's office, how many jobs were available and Cleverdon's office would in return, give Hannigan the names and addresses of people to whom offers of employment could be made. Those names would then be forwarded from Hannigan's office through the proper chain of command in DOT and the employment offer was made at the district level.

Hannigan's political background and the decisions which he made or which he took part, provide some support for the inference that plaintiffs' status as Republicans was a substantial factor in their separation from State service.

Another major support for plaintiffs' inference is the method used in selecting the plaintiffs here for layoff.[4] While this method of determining who was to be laid off apparently originated with defendant [242] Rhoads, there is evidence to the effect that it was done with the approval of a number of the other defendants. Prior layoffs in these same sections of the Department of Transportation had utilized seniority as the sole criteria in determining who was to be laid off, but in this instance the Democratic administration determined that this special method of selection was warranted. This methodology can only be construed as an attempt to return to an earlier time when A, B and C were the Republican maintenance workers and X, Y and Z were the Democratic maintenance workers and each change of administration brought changes in the laborers who worked on the State's highways.

Before terminating the discussion of the manner in which the layoff was accomplished, it is instructive to examine plaintiffs' exhibit 91. That exhibit is a memorandum from defendant Don Shelton, Administrative Manager for District 9, DOT, to his own file, dated June 14, 1973. The memorandum purports to record the final instructions received from defendant Rhoads concerning the layoff. It states that Rhoads received his instructions from "downtown" on the night before. It further records that the letter mailed to the returning *Bradley* plaintiffs contained no provisions for the individual to decline the offer of reinstatement. From this last fact, it can be inferred that defendants intended to lay off a number of

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[4] The method chosen was to trace the persons who had actually replaced *Bradley* plaintiffs on the job. This method has been discussed in Part I, supra, and provides substantial support for the holding in Part II, supra, and will not be discussed in detail here.

current employees equal to the number of *Bradley* plaintiffs without respect to whether those plaintiffs all returned to work or not.

While it is true that the number of employees laid off was equivalent to the number of *Bradley* plaintiffs returning to work and, in fact, one employee scheduled for layoff was not laid off when it was determined that a *Bradley* plaintiff, Frank Davis, was physically unable to return to work, a *Wren* plaintiff was laid off for each *Bradley* plaintiff who in fact reported. This was in spite of the fact that at the time they reported there was some doubt as to whether five of the *Bradley* plaintiffs were physically capable of performing the work, that four of the *Bradley* plaintiffs had not successfully completed the Department's required eye examination, that three were 65 years of age or older, that two took immediate leaves of absence and finally, that one resigned within two weeks of plaintiffs' layoff. In this regard, it should be noted that since the *Bradley* plaintiffs reported for work on June 20, 1973, and the *Wren* plaintiffs were not laid off until June 30, 1973, there is no doubt that defendants had notice, at least of the physical infirmities of the *Bradley* plaintiffs, prior to layoff.

Along this same line, plaintiffs have made a separate issue out of whether they were denied re-employment opportunities as a result of a partonage program in violation of their rights under the first amendment. None of the plaintiffs here, with the exception of Ira Harper, has been reinstated even though all plaintiffs purportedly had re-employment rights for a two-year period following their layoff. *Bradley* plaintiffs, Robertson and Rowe resigned their positions on July 13, 1973, and September 28, 1973, respectively. Howard Casey and Paul Potter, both plaintiffs here, made timely demands for re-employment. These demands were refused. Further, *Bradley* plaintiff John Davis died on November 26, 1973. *Wren* plaintiff Arthur Meinders, who was terminated to make space for Davis, made a similar demand for re-employment, but was also refused.

Defendants answered these particular demands for re-employment with letters stating that due to fiscal restraints those positions would not be filled. It is not the business of this Court to determine how the Illinois Department of Transportation distributes its allocated funds. However, it must be noted that plaintiffs proved that during the period subsequent to plaintiffs' layoff, funding was available for at least five so-called "ghost" employees in the district where plaintiffs were laid off. These employees were persons who, although they were on the payroll, were very rarely seen and whose function was unknown to those working in the district. The conclusion that they were political patronage workers is inescapable.

[243] These facts and circumstances when taken *in toto* establish by preponderance of the evidence, that plaintiffs' political associations were a substantial or motivating factor in their separation from the State service. No one fact or circumstance when taken alone is sufficient to discharge plaintiffs' burden, but when taken together, and when all reasonable inferences are drawn therefrom, I find that plaintiffs have discharged their burden.

Under the *Mt. Healthy* decision then, the burden is shifted to defendants to establish that plaintiffs would have been separated from State service in any event This burden has not been met.

Although defendants argued well, the bulk of their argument has been directed at obtaining the opposite inference from the facts and circumstances plaintiffs have argued. Their strongest argument is the established fact that all the workers in the affected units were Republicans and that no Democratic patronage workers, other than the *Bradley* plaintiffs, have to this date been hired in those units.[5]

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[5] There were no "ghost employees" carried on the payrolls of any of plaintiffs organization units. However, there apparently were such employees on the payroll of the District organization.

In my opinion this falls short of discharging their burden in at least two ways. First, defendants' evidence does not establish to my satisfaction, that fiscal restraints required the layoff of a number of current employees equivalent to the number of *Bradley* plaintiffs. Secondly, it appears to me to be undisputed that except for the activities of a number of these plaintiffs as the political patronage workers who had replaced the *Bradley* plaintiffs they would not have been chosen or at least might not have been chosen, for layoff.

Under these circumstances I believe that the plaintiffs employed in DOT, must prevail on the first amendment issue and so hold. Since the question of damages has been reserved for later hearing, as to the DOT plaintiffs, only issues as to the liability of individual defendants remain. These issues will be discussed in Part IV of the opinion. But before reaching those issues, the position of plaintiff Barger must be addressed.

[5] Plaintiff Claris Barger was employed as a maintenance equipment operator at the Anna State Hospital in the Department of Mental Health. He was the only plaintiff here laid off in DMH as a result of the *Bradley* order. In contrast to the DOT plaintiffs, Barger was laid off because although his seniority date was the same as four other workers in his unit, his total time of State service was less.

Judge Verticchio ordered three *Bradley* plaintiffs returned to DMH. One was unable to return because of ill health. Barger and Royal E. Kirkpatrick, not a plaintiff here, were laid off. Their layoffs were effective July 13, 1973. Dr. LeRoy P. Levitt, in his letter to defendant Nolan Jones, Director of the Department of Personnel, stated:

> These layoffs are due to surplus employees in the above classification which was created by court order in case no. 275969 [sic] filed in the Circuit Court of Sangamon County, which returned three former maintenance equipment operators to work on June

21, 1973. One of these employees has since resigned which is the reason two maintenance equipment operators are being laid off rather than three.

As to the first amendment claims asserted, plaintiff Barger can only show that he was a former Republican patronage worker, that he was laid off during a Democratic administration and that he was laid off in order to make room for a former Democratic patronage worker ordered reinstated by the *Bradley* decision. No other facts or circumstances concerning plaintiff Barger have asserted from which it can be inferred that Barger's layoff was due to his status as a Republican. Under these circumstances, I do not believe plaintiff Barger has discharged his burden. He has not established that the exercise of a right protected under the first amendment was a [244] substantial or motivating cause for his separation.

After an examination of the other issues presented on behalf of plaintiff Barger, excepting only those discussed in Part II, *supra,* I believe he has failed to establish that any of his rights under the Constitution were violated in his separation from State service. His major argument is that under the circumstances here alleged he was entitled to a pretermination hearing prior to his separation from State service. This, of course, is true if Barger was in fact discharged rather than laid off.

There is no question that were plaintiffs discharged rather than laid off they would be entitled to greater procedural protections. As Justice Underwood, writing for the Illinois Supreme Court, said in *Powell* v. *Jones*:

> [t]he apparent difference between procedures provided for certified employees in discharges and layoffs is the right to a plenary hearing and to counsel, witnesses, confrontation and cross-examination prior to his discharge for cause. 56 Ill.2d 70, 81, 305 N.E.2d 166, 171 (1973).

Be that as it may, as to the evidence presented on behalf of plaintiff Barger, I cannot say that the layoff was

a subterfuge for discharge. Under the analysis in Part II, *supra* I believe Barger has established that his rights to due process were violated. However, judgment must be for defendant on the remainder of plaintiff Barger's claims.

IV. Individual Liability

Plaintiffs here seek a mandatory injunction requiring reinstatement, compensatory and punitive damages, as well as attorneys' fees under 42 U.S.C. § 1988. The claims for money damages and attorneys' fees are made against the defendants in their individual capacities. Defendants in turn, respond that they are immune from such damages based on an application of the doctrine of qualified good-faith immunity.

For reasons which will appear more fully below, the injunction shall be granted and punitive damages denied, compensatory damages, and attorneys' fees allowed, but the questions of immunity for some defendants will be reserved.

Originally, Nolan B. Jones, Langhorne Bond, and LeRoy Levitt were named both individually and in their official capacities as Director of the Department of Personnel, Secretary of Department of Transportation, and Director of the Department of Mental Health respectively. Subsequently, the present holders of those offices, William Boys, Director of the Department of Personnel, Robert DeVito, Director of the Department of Mental Health, and John D. Kramer, Secretary of the Department of Transportation, were substituted for Jones, Bond and Levitt in their official capacities. These substituted defendants returned plaintiffs to work under a preliminary order of this Court. That preliminary order is justified under the findings of Part II and Part III of this opinion, and is hereby made permanent.

[6] In response to plaintiffs' claims for compensatory and punitive damages as well as attorneys' fees, defendants have raised the doctrine of qualified immunity based on good-faith. It has been established since *Ten-*

ney v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), that under certain circumstances immunity protects governmental officials from liability for damages sought under 42 U.S.C. § 1983, resulting from actions taken in their official capacities. For some governmental officials, for example legislators and judges, that immunity is absolute. *See, Tenney, supra,* at 376, 71 S.Ct. 783 and *Stump* v. *Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). For others, only a qualified immunity based on good-faith is available. *See, Scheuer* v. *Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

> It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of their official conduct. *Scheuer, supra* at 247-248, 94 S.Ct. at 1692.

[245] [7] In order for this immunity to protect the governmental official, the official must prove that he did not know nor reasonably should have known, that the actions he took would violate the constitutional rights of the plaintiff *and* that he did not take the actions with any malicious intent to cause a deprivation of constitutional rights or other injury to plaintiff. *Wood* v. *Strickland,* 420 U.S. 308, 322, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). *See also, Foster* v. *Zeeko,* 540 F.2d 1310 (7th Cir. 1976); *Hostrop* v. *Bd. of Jr. College Dist. No. 515,* 523 F.2d 569 (7th Cir. 1975) and *Mims* v. *Bd. of Education of the City of Chicago,* 523 F.2d 711 (7th Cir. 1975).

[8] Thus, the *Wood* test contains both objective and subjective elements. Defendants must establish the lack of each of these elements in order to be entitled to immunity. Further, I believe that if it can be shown that any defendant acted with malicious intent to cause deprivation of constitutional rights or other injury to any plaintiff, the subjective portion of the *Wood* test, that plaintiff would be entitled to punitive damages.

However, after an examination of the briefs concerning the role of each individual defendant and a review of the testimony of those defendants either taken in open Court or through depositions I believe that defendants have successfully established the lack of any malicious intent. That finding precludes the award of punitive damages against any defendant.

There remains, however, an examination of defendants' actions under the objective portion of the *Wood* test. The question is whether each defendant knew or reasonably should have known, that the actions he took would violate the constitutional rights of any plaintiff.

Plaintiffs' rights have been found to have been violated in two respects. In Part II, I determined that plaintiffs' rights to due process of law were violated through the handling of the *Bradley* decision and its implementation. In Part III of his opinion I have determined that plaintiffs' first amendment rights were violated since plaintiffs' status as Republicans was a substantial or motivating factor in the personnel actions taken.

The part played by any one defendant in the violation of plaintiffs' rights is difficult to ascertain. Counsel for defendant has argued that plaintiffs' claims read like a conspiracy case even though no conspiracy is charged. To a large extent this is true. Each defendant played a role, although at times a fairly minimal role, in the violation of plaintiffs' rights. The burden on defendants at this point is to show that they did not know nor reasonably should have known that their actions violated plaintiffs' rights. Defendants thus have the burden of proving a negative, the lack of knowledge. Because of the small part played in the violation of plaintiffs' rights by a number of the defendants and because plaintiffs' assertion of political motivation has been proven by inference rather than direct evidence, the burden of each individual defendant is almost impossible to discharge.

In this area, the defendants each have the burden of proving that as an individual, they did not know nor reasonably should have known, either that politically motivated personnel transactions violated plaintiffs' first amendment rights or that the personnel transaction at issue was politically motivated.

No defendant here can be heard to say that he did not know or should not have known that party affiliation was an impermissible basis on which to found a personnel transaction. While neither the *Mt. Healthy* rationale nor the decision in *Elrod* v. *Burns,* supra was available to defendants at the time their actions were taken, the roots of the *Elrod* decision had been clearly established in *Illinois State Employees Union* v. *Lewis,* 473 F.2d 561 (7th Cir. 1972), *cert. denied* 410 U.S. 928, 93 S.Ct. 1364, 35 L.Ed.2d 590 (1973). While patronage dismissals had been the rule rather than the exception, the *Lewis* case held such transactions impermissible The *Lewis* decision was not only delivered in the Seventh Circuit, but involved patronage practices in the Illinois Secretary of State's Office.

[246] Under that circumstance, and with that authority available to them, I do not believe that any defendant can establish that they should not have known that party affiliation was an impermissible basis on which to found a personnel transaction. Thus, I believe it fair to say that each of the defendants knew or should have known that the personnel transactions asserted here, if politically motivated, were constitutionally impermissible.

With that predicate, the question remains whether each defendant knew or should have known that the acts he took, aided a politically motivated personnel transaction. Since a number of the individual defendants here are career civil service workers who have served under a number of administrations, both Republican and Democratic, it is unlikely that any of those defendants were personally motivated by political considerations. However, I believe if they knew or should have known that the actions they took were in aid of partisan political

practices, they may be liable for the political motivations of others.

[9] Two of the defendants, defendants Hannigan and Rhoads, had to know of the political motivations. Those two were present at the initial meeting where it was determined that the *Bradley* plaintiffs had to be returned, that an equivalent number of then current employees had to be laid off and that the method to be utilized to determine who was to be laid off was to find the employee who had actually viced or replaced the returning *Bradley* plaintiff. Those actions provided inferences which led me to conclude in Part III of this opinion that the personnel transactions involved were in fact politically motivated. Defendants Rhoads and Hannigan are responsible for those decisions. They have been unable to establish any basis for qualified immunity. They must be held liable for compensatory damages and attorneys' fees.

[10] Three other defendants, Ronan, Knox and Jones, I believe have successfully established either that they individually took no action which aided in the violation of plaintiffs' rights or that they had no reason to know of the political motivation behind the transactions involved. They are entitled to qualified immunity and are not liable for any compensatory damages.

As to the remaining defendants, there are facts which would lead one to infer that they knew or should have known of the politically motivated nature of the personnel actions each individual defendant was ordered to take. However, at this point I expressly decline to find their individual liability for the reason that it appears unnecessary at this point.

During the pendency of this litigation, the State of Illinois enacted an indemnity provision for state employees. Public Act 80-1078 (December 3, 1977). Ch. 127, Ill.Rev.Stat. § 1302. The statute is intended to provide indemnity for any state employee who is named in a civil proceeding alleging the deprivation of a civil

or constitutional right which arose out of any act or omission occurring within the scope of the employee's State employment. The Act provides in part:

> (c) In any such proceeding unless the Court or jury finds that the conduct or inaction which gave rise to the claim or cause of action was intentional, willful or wanton misconduct and was not intended to serve or benefit interests of the State, the State shall indemnify the State employee for any damages awarded and court costs and attorneys' fees assessed as part of any final and unreversed judgment.

I believe that defendants Rhoads and Hannigan are entitled to indemnity under this provision. I decline to so hold only because the matter is not properly before me.

If that is the case, there appears no point in entering the thorny thicket of individual immunity for the remaining defendants. The defendants are jointly liable for compensatory damages and attorneys fees. Since two defendants have been found so liable and since I believe those two defendants are entitled to be indemnified by the State of Illinois, it appears of little moment [247] whether the remaining defendants are or are not entitled to immunity. However, should it appear at some later date that defendants Rhoads and Hannigan are not entitled to indemnity, I will not hesitate to enter the immunity thicket and determine the individual culpability of the remaining four defendants.

As to the matter of attorneys' fees sought under 42 U.S.C. § 1988 I believe they should be awarded in this action and so hold. They appear to be covered by the above quoted indemnity statute. However, if indemnity is not forthcoming, I note that under the recent United States Supreme Court case of *Hutto et al.* v. *Finney, et al.*, ... U.S. ....., 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), individual State departments, i.e., the Department of Personnel, the Department of Transportation, and the Department of Mental Health and thus, the State of

Illinois, can be held liable for attorneys' fees under 42 U.S.C. § 1988 even though those State departments and the State itself are not party to the action. Since that statute was passed in order to enforce the fourteenth amendment, the State's eleventh amendment immunity from retroactive relief as found in *Edelman* v. *Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) is no bar. *See, Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) and *Hutto* v. *Finney, supra*. and *Bond* v. *Stanton*, 555 F.2d 172 (7th Cir. 1977).

In light of the fact that the defendants throughout have been represented by a Special Assistant Attorney General of the State Illinois and with a view to the peculiar facts and circumstances of this case, I believe it would be appropriate that the attorneys' fee award be assessed against the present state officials in their official capacities and thus against the State departments and not the individual defendants. But, since the indemnity statute appears to reach the same result at this time, attorneys' fees in amounts to be determined later will be assessed against defendants Rhoads and Hannigan. Should indemnity not be forthcoming, this matter will be reconsidered on appropriate motion in light of the *Hutto* case.

In summary then, with the exception of plaintiff Barger, I find that the first amendment rights of all plaintiffs were violated. I further find that the rights of all defendants including plaintiff Barger were violated under the due process clause.

All plaintiffs were entitled to a mandatory permanent injunction requiring their return to work.

All plaintiffs, with the exception of plaintiff Barger, are entitled to compensatory damages in amounts to be determined later. Defendants Rhoads and Hannigan have no immunity and are jointly liable for these compensatory damages and attorneys' fees under 42 U.S.C. § 1988.

The individual liability of defendants Shelton, Miley and Bond are reserved.

Defendants Knox and Jones are not liable for any compensatory damages.

No plaintiffs are entitled to punitive damages.

Counsel for plaintiff is directed to prepare an order to this effect. Cause shall be set for proceedings in accord with this opinion at a later date.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

CECIL WREN, et al.,

Plaintiffs,

v.

NOLAN B. JONES, et al.,

Defendants.

No. S-CIV-73-204

INTERIM JUDGMENT ORDER
Filed Oct. 18, 1978

This cause having come on for trial before the Court without a jury, evidence taken and received, Proposed Findings of Fact and Conclusions of Law submitted by the parties and the issues fully briefed, the Court being advised in the premises and having issued on August 4, 1978, its Memorandum Order in which were made findings and conclusions of law pursuant to F. R. Civ. P. 52(a);

It is therefore entered, ordered, adjudged and decreed as follows:

1. That within 30 days of the date of this Order, defendants, John D. Kramer, in his official capacity as Secretary of Transportation, State of Illinois and William R. Boys, in his official capacity as Director of Personnel, State of Illinois, offer to reinstate, in certified status, as of the date of his termination, each of the following named plaintiffs in the same or equivalent position of employment held by him at the time of his

separation from employment, (1) to and including March 31, 1977:

Charles Leroy Cochran	Luster Etheridge
William Roosevelt Brooks	Arthur William Meinders
Charles Anthony Wenzel	Arnold John Kommer
Rollie Linder	Theodore Jewell Patterson
Paul Potter	Carl Dixon
Jewell Elbert Sisk	Robert Gale Lovellette
Lowell Ray Holmes	James Paul Caldwell
Forrest Ray Simmons	Lacie Dean Betts
Richard Dwight Peeler	William Allen Peeler

Edward F. Atkins

(2) to and including June 5, 1975:

Ira Walter Harper

2. That within 30 days of the date of this Order, defendants, Robert A. deVito, in his official capacity as Director of Mental Health, State of Illinois and William R. Boys, in his official capacity as Director of Personnel, State of Illinois, offer to reinstate, in certified status, as of the date of his termination, plaintiff, Claris D. Barger, in the same or equivalent position of employment held by him at the time of his separation from employment to and including March 31, 1977.

3. Defendants, J. Brian Hannigan and Robert D. Rhoads, are held and found to be personally liable, jointly and severally, for compensatory damages due to the plaintiffs named in paragraph 1 hereof and, in addition, to plaintiffs Verla Casey, Leoda Wren, Velma Jenkins and Lillie Mathis in such amounts as will be determined after further hearing and findings of this Court, for which purpose this cause is continued.

4. Judgment is entered on behalf of defendant, Alfred Ronan, in his individual capacity, in which capacity this cause is dismissed.

5. Judgment has been entered on behalf of defendants, Nolan B. Jones and David E. Knox in their individual capacities in which capacities this cause is dismissed as to said defendants.

6. The Court reserves for further ruling: (a) the liability of individual defendants, Langhorne M. Bond, Donald Shelton and Richard D. Miley, for the payment of compensatory damages, attorneys fees and costs and (b) the liability of defendants, John D. Kramer, William R. Boys and Robert A. deVito in their official capacities for the payment of attorney fees and costs.

7. Defendants, J. Brian Hannigan and Robert D. Rhoads, are liable, jointly and severally, for the payment of plaintiffs' attorneys fees and costs in such amounts as to be determined after further hearing for which purpose this cause is continued.

This cause is continued for further hearing in accordance with the terms of this Order and the Memorandum Order of August 4, 1978.

Enter: 10-18-78.

/s/ J. Waldo Ackerman
United States District Judge

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

CECIL WREN, et al.,

Plaintiffs,

v.

NOLAN B. JONES, et al.,

Defendants.

No. S-CIV-73-204

AMENDED INTERIM JUDGMENT ORDER
Filed Dec. 21, 1978

The Interim Judgment Order entered by this Court on October 18, 1978 is hereby amended in paragraph 1 to include the name of Plaintiff James Edward Johnson in the list of named Plaintiffs who are to receive, within 30 days, an offer of reinstatement in certified status as of the date of termination in the same or equivalent position of employment held at the time of separation from employment (1) to and including March 31, 1977, as required of the Defendants John D. Kramer, in his official capacity as Secretary of Transportation, State of Illinois, and William R. Boys, in his official capacity as Director of Personnel, State of Illinois.

Enter: /s/ J. Waldo Ackerman

Dated: 12-20-78.

APPENDIX E

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS — SPRINGFIELD DIVISION

CECIL WREN, et al.,

Plaintiffs,

v.

NOLAN B. JONES, et al.,

Defendants.

No. S-Civ-73-204

ORDER
Filed Sept. 17, 1979

This Court, in *Wren* v. *Jones*, 457 F.Supp. 234 (S.D. Ill. 1978), previously has found two defendants, Hannigan and Rhoads, liable to twenty-five plaintiffs who were terminated from their employment in violation of their rights under the first amendment and due process clause. (A twenty-sixth plaintiff, plaintiff Barger, was found not entitled to compensatory damages but did obtain a permanent injunction requiring his return to work.) Assessment of damages and attorneys' fees remains to be decided in this order.

Damages

This Court has undertaken the laborious task of individually determining twenty-five separate plaintiffs' claims to damages in this case. Each plaintiff's particular circumstances have been examined. In addition, the Court has considered whether the parties made sufficient efforts to mitigate their damages and also has considered the

parties' arguments regarding overtime pay. Plaintiffs sought to recover back pay for overtime they might have worked had they not been laid off. Their claims including overtime totalled approximately $641,000. The claims for overtime are not allowed. In addition, all overtime actually earned during the period of the layoff should serve to offset the base salary amount along with the other items of income and offsets received by the plaintiffs during that time. Consequently, the Court finds the following to be the compensation plaintiffs lost and consequently their damages:

Atkins	$21,000.00
Betts	0
Caldwell	$15,000.00
Dixon	$21,735.00
Etheridge	$20,000.00
Kommer	$5,100.00
Linder	$15,000.00
Lovelette	$22,050.00
Patterson	$30,000.00
R. Peeler	$27,000.00
Potter	$22,000.00
Simmons	$37,000.00
Sisk	$21,800.00
Mathis	$20,000.00
Jenkins	$11,125.55

As to the following plaintiffs, the defendants' attorney does not contest their mitigation efforts. Thus, except for the overtime issue decided above in favor of defendants, the compensation lost and the damages for the following plaintiffs as the result of stipulation are:

Brooks	$19,378.00
Cochran	$8,832.55
Harper	$9,957.00
Johnson	$16,378.00
Meinders	$161.15
W. Peeler	$245.94

Wenzel	$10,900.00
Wren	$5,100.00
*Casey	$17,765.51
Holmes	$17,812.00

* This figure includes $2,000 in life insurance benefits which would have been paid to the plaintiff had he died while working for the State. The defendants did not stipulate to this amount.

Attorneys' Fees

By its very language, an award of attorneys' fees is within the trial court's discretion under 42 U.S.C. § 1988. The legislative history indicates that a prevailing plaintiff should recover attorneys' fees "unless special circumstances would render such an award unjust." S.Rep.No. 94-1011, 94th Cong., 2d Sess. 5 (1976) *reprinted in* 1976 U.S. Code Cong. & Admin. News, 5908, 5912, *quoting Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *accord Perez* v. *Rodriguez Bou*, 575 F.2d 21, 24 (1st Cir. 1978); *Morrow* v. *Dillard*, 580 F.2d 1284, 1300 (5th Cir. 1978). This Court feels that such special circumstances exist in this case, allowing the Court to exercise its discretion. Thus, one-half the attorneys' fees will be awarded to the plaintiffs against defendants and the remaining one-half will be assessed pro-rata among the plaintiffs.* There were extended delays prior to the issuance of the reinstatement order which were the fault of neither party. These delays artificially extended the period over which the case pended. The Court has considered other factors relating to the award of attorneys' fees and feels that apportioning the fees as described above gives the most equitable result.

* If the Court of Appeals should find for the plaintiffs only on the due process issue and not on the liability issue, I would assess all fees against the defendants.

Due to the lack of malicious intent on defendants' part, these fees shall be assessed against them solely in their official capacity. *See Hutto* v. *Finney*, 437 U.S. 678, 700 (1978); *Pickett* v. *Milam*, 579 F.2d 1118, 1120 (8th Cir. 1978). The legislative history of section 1988 provides that awards of attorneys' fees against a state employee in his official capacity "like other items of cost will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News, 5908, 5913 (footnotes omitted). Thus it is contemplated that payment will be made from official funds available to the defendants or by the State itself. It should be noted that this result would also be achieved under Illinois' indemnity statute for state employees. Ill.Rev.Stat. ch. 127, § 1302 (1977).

I find reasonable attorneys' fees to be $127,700 in this case. This conclusion is reached according to criteria set forth in H.R.Rep. No. 94-1558 and S.Rep. No. 94-1011, Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988, as amended; *Water* v. *Wisconsin Steel Works of International Harvester*, 502 F.2d 1309 (7th Cir. 1974), *cert denied* 425 U.S. 997 (1976); *Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974); *McPherson* v. *School Dist. No. 186*, 465 F.Supp. 749, 756 (S.D.Ill. 1978). This Court has examined the number of hours required in the preparation of this case, the results obtained, the experience, reputation and ability of the attorneys involved, and the customary fee for complex litigation by those of comparable abilities. The plaintiffs' attorney, Mr. Hanley, displayed unusual legal ability in developing and presenting a case based in large part on voluminous state records. This work necessarily required many hours of concentrated effort on his part. Costs and paralegal expenses in the amount of $9,938.29 will also be allowed to plaintiffs against defendants. Mr. Hagen, as attorney for the defendants, capably defended

their interests in this case. Both attorneys are to be commended for their diligence and thoroughness.

In light of the finding of no malicious intent on the part of defendants Rhoads and Hannigan, they appear to be entitled to indemnity in the above amounts of damages and attorneys' fees under Ill.Rev.Stat. ch 127, 1302 (1977). That statute provides in part:

> (c) In any such proceeding unless the Court or jury finds that the conduct or inaction which gave rise to the claim or cause of action was intentional, willful or wanton misconduct and was not intended to serve or benefit interests of the State, the State shall indemnify the State employee for any damages awarded and Court costs and attorneys' fees assessed as part of any final and unreversed judgment.

Part (f) of the statute provides for indemnity whether the individual is sued in an individual or official capacity.

Because indemnity appears to be forthcoming for these two defendants, I am still reserving judgment as to the other defendants. As to defendants Rhoads and Hannigan, there is no just reason for delay and therefore I am directing a final judgment be entered as to them pursuant to Federal Rule 54(b).

Enter this 17 day of September, 1979.

/s/ J. Waldo Ackerman
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE
CENTRAL DISTRICT OF ILLINOIS

CECIL WREN, et al.,

vs.

NOLAN B. JONES, individually and as Director of the Department of Personnel of the State of Illinois, et al.

No. S-CIV-73-204

JUDGMENT
Filed Sept. 19, 1979

This action came on for trial before the Court, Honorable J. Waldo Ackerman, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that pursuant to Order entered September 17, 1979 and Amended Order entered September 19, 1979, Judgment is hereby entered in favor of each of the following plaintiffs and against defendants Robert Rhoads and Brian Hannigan, in the amounts of:

$21,000.00 - Atkins, Edward F.
$ 35.70 - Betts, Lacey Dean
$15,000.00 - Caldwell, James Paul
$21,735.00 - Dixon, Carl
$20,000.00 - Etheridge, Luster
$ 5,100.00 - Kommer, Arnold John
$15,000.00 - Linder, Rollie
$22,050.00 - Lovelette, Robert Gail
$30,000.00 - Patterson, Theodore Jewell
$27,000.00 - R. Peeler, Richard Dwight
$22,000.00 - Potter, Paul

$37,000.00 - Simmons, Forest Ray
$21,800.00 - Sisk, Jewell Elbert
$20,000.00 - Mathis, Lillie
$11,125.55 - Jenkins, Velma
$19,378.00 - Brooks, William Roosevelt
$ 8,832.55 - Cochran, Charles Leroy
$ 9,957.00 - Harper, Ira Walter
$16,413.08 - Johnson, James Edward
$ 161.15 - Meinders, Arthur William
$ 245.94 - W. Peeler, William Allan
$10,966.00 - Wenzel, Charles Anthony
$ 5,100.00 - Wren, Leoda
$17,765.51 - Casey, Verla
$15,831.86 - Holmes, Lowell Ray

Dated at Springfield, Illinois, this 19th day of September, 1979.

/s/ Robert J. Kauffman
Clerk of Court

/s/ Joan Keltner
Joan Keltner, Deputy Clerk

APPENDIX G

IN THE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS—SPRINGFIELD DIVISION

CECIL WREN, et al.,

Plaintiffs,

v.

NOLAN B. JONES, et al.,

Defendants.

No. S-CIV-73-204

ORDER
Filed Sept. 19, 1979

This Court entered an order on September 17, 1979, in the case of Wren v. Jones, S-Civ-73-204, assessing damages and attorneys' fees. This Court, pursuant to Federal Rule 60(a), hereby corrects that order in the following ways:

Plaintiff Betts is entitled to $35.70.
Plaintiff Johnson is entitled to $16,413.08.
Plaintiff Wenzel is entitled to $10,966.00.
Plaintiff Holmes is entitled to $15,831.86.
Enter this 19 day of September, 1979.

/s/ J. Waldo Ackerman
United States District Judge

APPENDIX H

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

CECIL WREN, et al.,

Plaintiffs,

v.

NOLAN B. JONES, et al.,

Defendants.

No. S-CIV-73-204

O R D E R
Filed Jan. 15, 1980

UPON THE MOTION of the Defendants, JOHN D. KRAMER, in his official capacity as Secretary of the Department of Transportation of the State of Illinois; WILLIAM R. BOYS, in his official capacity as Director of the Department of Personnel of the State of Illinois; and, ROBERT A. deVITO, in his official capacity as Director of the Department of Mental Health and Developmental Disabilities, by William J. Scott, Attorney General for the State of Illinois, and Raymond L. Terrell and Henry C. Hagen, Special Assistant Attorneys General for the State of Illinois for entry of a final judgment pursuant to Rule 54(b) as to these Defendants, it is hereby:

ORDERED, ADJUDGED AND DECREED that as to Defendants, JOHN D. KRAMER, WILLIAM R. BOYS and ROBERT A. deVITO, there is no just reason for delay of the implementation of the Court's Orders of August 4, 1978, October 18, 1978, December 21, 1978, September 17, 1979, and September 19, 1979, and, therefore, I am directing a final judgment be entered as to these Defendants pursuant to said Rule 54(b).

ENTERED this 15 day of January, 1980.

/s/ J. Waldo Ackerman
United States District Judge

APPENDIX I

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156 CASES WHICH TURN ON OR DISCUSS THE BURDEN OF PROOF HOLDING OF MT. HEALTHY CITY SCHOOL DISTRICT BD. OF ED. v. DOYLE, 429 U.S. 274 (1977)

Mt. Healthy cases by category:

Public Employee:

3, 4, 7, 13, 22, 25, 27, 28, 33, 36, 37, 39, 40, 43, 44, 45, 46, 47, 49, 52, 57, 58, 59, 63, 66, 68, 69, 71, 72, 73, 74, 75, 78, 80, 81, 83, 86, 87, 89, 90, 91, 92, 95, 96, 97, 98, 99, 100, 101, 104, 105, 106, 107, 108, 109, 110, 114, 117, 118, 120 (religious), 123, 124, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 140, 141, 142, 144, 145, 147, 148, 149, 150, 151, 152

Labor:

10 (age), 17, 21, 24, 29, 32 (crim.), 34, 41, 48, 50, 65, 76, 88, 94, 136, 143 (age)

Race:

6, 61, 67, 68, 85, 93

Sex:

2, 12, 20, 64 (P.E.), 116, 139

Military:

5, 79, 153, 154, 155, 156

Prisoner:

8, 62, 119, 121

Miscellany: 82 (suit to enjoin criminal proceedings) 30 (Public Housing) 31 (Medicaid) 51 (Political) 26 (Censorship)

Cases which merely cite *Mt. Healthy,* but say nothing about it:

1, 9, 11, 14, 15, 16, 18, 19, 23, 35, 38, 42, 53, 54, 55, 56, 60, 70, 77, 84, 102, 103, 111, 112, 113, 115, 122, 125, 137, 138, 146

DISTRICT OF COLUMBIA CIRCUIT

1. *Tygrett* v. *Barry*, 627 F.2d 1279, 1282, 1287 (D.C. Cir. 1980)
2. *Hanson* v. *Hoffman*, 628 F.2d 42, 49, 51-52 (D.C. Cir. 1980)
3. *Mazaleski* v. *Treusdell*, 562 F.2d 701, 715-16, 726 (D.C. Cir. 1977)
4. *Pinkney* v. *District of Columbia*, 439 F.Supp. 519, 535 (D.D.C. 1977)
5. *Dilley* v. *Alexander*, 440 F.Supp. 375, 378-79 (D.D.C. 1977)

FIRST CIRCUIT

6. *DeGrace* v. *Rumsfeld*, 614 F.2d 796, 805-6 (1st Cir. 1980)
7. *Brule* v. *Southworth*, 611 F.2d 406, 410-11 (1st Cir. 1979)
8. *McDonald* v. *Hall*, 610 F.2d 16, 18-19 (1st Cir. 1979)
9. *Needleman* v. *Bohlen*, 602 F.2d 1, 6 (1st Cir. 1979)
10. *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1009-10, 1019 (1st Cir. 1979)
11. *Texas Instruments, Inc.* v. *N.L.R.B.*, 599 F.2d 1067, 1073 (1st Cir. 1979)
12. *Fisher* v. *Flynn*, 598 F.2d 663, 664-65 (1st Cir. 1979)

13. *Rosaly* v. *Ignacio*, 593 F.2d 145, 148-49, 151 (1st Cir. 1979)

14. *Liberty Mut. Ins. Co.* v. *N.L.R.B.*, 592 F.2d 595, 606 (1st Cir. 1979)

15. *Pilkington* v. *Bevilacqua*, 590 F.2d 386, 388 (1st Cir. 1979)

16. *Gual Morales* v. *Hernandez Vega*, 579 F.2d 677, 681 (1st Cir. 1978)

17. *N.L.R.B.* v. *South Shore Hospital*, 571 F.2d 677, 682 (1st Cir. 1978)

18. *Alicea Rosado* v. *Garcia Santiago*, 562 F.2d 114, 117-18 (1st Cir. 1977)

19. *Sam Miguel* v. *Lugo*, 560 F.2d 34 (1st Cir. 1977)

20. *Mack* v. *Cape Elizabeth School Bd.*, 553 F.2d 720, 722 (1st Cir. 1977)

21. *Coletti's Furniture, Inc.* v. *N.L.R.B.*, 550 F.2d 1292, 1293 (1st Cir. 1977)

22. *Marshall* v. *Elwell*, 495 F.Supp. 306, 310-11 (D.N.H. 1980)

23. *Harris* v. *White*, 479 F.Supp. 996, 1006 (D.Mass. 1979)

24. *Marshall* v. *Commonwealth Aquarium*, 469 F.Supp. 690, 692 (D.Mass. 1979)

25. *Needleman* v. *Bohlen*, 457 F.Supp. 942, 946 (D.Mass. 1978)

26. *Right To Read Defense Com.* v. *School Com., Etc.*, 454 F.Supp. 703, 712 (D.Mass. 1978)

27. *Pilkington* v. *Bevilacqua*, 439 F.Supp. 465, 472-73, 475-77 (D.R.I. 1977)

SECOND CIRCUIT

28. *Janusaitis* v. *Middlebury Volunteer Fire, Etc.*, 607 F.2d 17 (2d Cir. 1979)

29. *Waterbury Community Antenna, Inc.* v. *N.L.R.B.*, 587 F.2d 90 (2d Cir. 1978)

30. *Davis* v. *Village Park II Realty Co.*, 578 F.2d 461, 464 (2d Cir. 1978)

31. *Winters* v. *Lavine*, 574 F.2d 46, 64-66 (2d Cir. 1978)

32. *United States* v. *Winston*, 558 F.2d 105, 110 (2d Cir. 1977)

33. *Rocker* v. *Huntington*, 550 F.2d 804, 806 (2d Cir. 1977)

34. *McCarthy* v. *Cortland Cty. Community Action*, 487 F.Supp. 333 (E.D.Mo. 1980)

35. *Jones* v. *Kneller*, 482 F.Supp. 204 (E.D.N.Y. 1979)

36. *Burns* v. *Rovaldi*, 477 F.Supp. 270, 275, 277-83 (D.Conn. 1979)

37. *Lieberman* v. *Gant*, 474 F.Supp. 848, 873-74 (D.Conn. 1979)

38. *Economou* v. *Butz*, 466 F.Supp. 1351 (S.D.N.Y. 1979)

39. *Janusaitis* v. *Middlebury Volunteer Fire*, 464 F. Supp. 288 (D.Conn. 1979)

40. *Oates* v. *United States Postal Serv. New York*, 458 F.Supp. 57, 59 (S.D.N.Y. 1978)

41. *NLRB* v. *Charles Batchelder Co., Inc.*, ... F.2d ..... (2d Cir. 1981), 106 LRRM 3050, 3055-57 (2d Cir. 1981)

42. *Economou* v. *Butz*, 84 F.R.D. 678 (S.D.N.Y. 1979)

THIRD CIRCUIT

43. *Trotman* v. *Board of Trustees of Lincoln University*, 635 F.2d 216 (3d Cir. 1980)

44. *Smithers* v. *Bailar*, 629 F.2d 892, 896-98 (3d Cir. 1980)

45. *Skehan* v. *Bd. of Trustees of Bloomsburg State Col.*, 590 F.2d 470 (3d Cir. 1978)

46. *Niederhuber* v. *Camden Cty. Vocational, Etc.*, 495 F.Supp. 273 (D.N.J. 1980)

47. *Farkas* v. *Thornburgh*, 493 F.Supp. 1168 (E.D.Pa. 1980)

48. *Goodwin* v. *City of Pittsburgh*, 480 F.Supp. 627 (W.D.Pa. 1979)

49. *Eckerd* v. *Indian River Sch. Dist.*, 475 F.Supp. 1350 (D.Del. 1979)

50. *Liotta* v. *National Forge Co.*, 473 F.Supp. 1139 (W.D.Pa. 1979)

51. *Gewertz* v. *Jackman*, 467 F.Supp. 1047, 1050, 1058-60 (D.N.J. 1979)

52. *Knotts* v. *Bewick*, 467 F.Supp. 931, 936-37 (D.Del. 1979)

53. *Ruhlman* v. *Hankinson*, 461 F.Supp. 145 (W.D.Pa. 1978)

54. *Bagby* v. *Beal*, 455 F.Supp. 881, 889 (M.D.Pa. 1978)

55. *Lewis* v. *Delaware State College*, 455 F.Supp. 239, 248, 251 (D.Del. 1978)

56. *DiLuigi* v. *Kafkalas*, 437 F.Supp. 863, 872 (M.D.Pa. 1977)

57. *Aumiller* v. *University of Delaware*, 434 F.Supp. 1273, 1292-93, 1303 (D.Del. 1977)

FOURTH CIRCUIT

58. *Smith* v. *University of North Carolina*, 632 F.2d 316, 331-34, 336-37, 339-40 (4th Cir. 1980)

59. *Ledford* v. *Delancey*, 612 F.2d 883, 885-86 (4th Cir. 1980)

60. *Bradford* v. *Textile Wkrs. of America, AFL-CIO,* 563 F.2d 1138, 1143-44 (4th Cir. 1977)

61. *Fralin & Waldron, Inc.* v. *County of Henrico, Va.,* 474 F.Supp. 1315, 1317-18 (E.D.Va. 1979)

62. *Lamb* v. *Hutto,* 467 F.Supp. 562, 565-66 (E.D.Va. 1979)

63. *Miller* v. *Board of Ed. of Cty. of Lincoln,* 450 F. Supp. 106, 109-13 (S.D.W.Va. 1978)

64. *Sumler* v. *City of Winston-Salem,* 448 F.Supp. 519, 528-29 (M.D.N.C. 1978)

65. *Davis* v. *Ampthill Rayon Workers, Inc.,* 446 F.Supp. 681, 687 (E.D.Va. 1978)

66. *Cherry* v. *Burnett,* 444 F.Supp. 324, 326-27, 330-34 (D.Md. 1977)

67. *Lewis* v. *Bethlehem Steel Corp.,* 440 F.Supp. 949, 966 (D.Md. 1977)

68. *Johnson* v. *Butler,* 433 F.Supp. 531, 535-36 (W.D.Va. 1977)

FIFTH CIRCUIT

69. *Bickel* v. *Burkhart,* 632 F.2d 1251, 1255-58 (5th Cir. 1980)

70. *Williams* v. *Rhoden,* 629 F.2d 1099, 1103 (5th Cir. 1980)

71. *Van Ooteghem* v. *Gray,* 628 F.2d 488, 492-93, 497-99 (5th Cir. 1980)

72. *D'Andrea* v. *Adams,* 626 F.2d 469, 472 (5th Cir. 1980)

73. *Tanner* v. *McCall,* 625 F.2d 1183, 1189-90, 1192-94 (5th Cir. 1980)

74. *Downing* v. *Williams,* 624 F.2d 612, 622-24 (5th Cir. 1980)

75. *Smith* v. *Price,* 616 F.2d 1371, 1375-77, 1379 (5th Cir. 1980)

76. *Whiting* v. *Jackson State University,* 616 F.2d 116, 122 (5th Cir. 1980)

77. *Robinson* v. *Price,* 615 F.2d 1097, 1098-1100 (5th Cir. 1980)

78. *Kingsville Independent Sch. Dist.* v. *Cooper,* 611 F.2d 1109, 111-14 (5th Cir. 1980)

79. *Jones* v. *Alexander,* 609 F.2d 778, 782-83 (5th Cir. 1980)

80. *Lindsey* v. *Bd. of Regents of Univ., Etc.,* 607 F.2d 672, 676 (5th Cir. 1979)

81. *Davis* v. *Williams,* 598 F.2d 916, 920 (5th Cir. 1979)

82. *Wilson* v. *Thompson,* 593 F.2d 1375, 1385-87 (5th Cir. 1979)

83. *Goss* v. *San Jacinto Junior College,* 588 F.2d 96, 99-100 (5th Cir. 1979)

84. *Molina* v. *El Paso Independent Sch. Dist., Etc.,* 583 F.2d 213, 215 (5th Cir. 1978)

85. *United States* v. *Texas Ed. Agency,* 579 F.2d 910, 916 (5th Cir. 1978)

86. *Hastings* v. *Bonner,* 578 F.2d 136, 141 (5th Cir. 1978)

87. *Love* v. *Sessions,* 568 F.2d 357, 360-61 (5th Cir. 1978)

88. *Federal-Mogul Corp.* v. *N.L.R.B.,* 566 F.2d 1245, 1259, 1265 (5th Cir. 1978)

89. *Stewart* v. *Bailey,* 561 F.2d 1195, 1195-96 (5th Cir. 1977)

90. *Garza* v. *Rodriguez,* 559 F.2d 259, 261-62 (5th Cir. 1977)

91. *Ayers* v. *Western Line Consol. Sch. Dist.,* 555 F.2d 1309, 1314-17 (5th Cir. 1977)

92. *Johnson* v. *San Jacinto Jr. College,* 498 F.Supp. 555, 578 (S.D.Tex. 1980)

93. *Wells* v. *Hutchinson,* 499 F.Supp. 174, 193 (E.D.Tex. 1980)

94. *Wright* v. *Allis-Chalmers,* 496 F.Supp. 349, 353 (N.D. Ala. 1980)

95. *Hillis* v. *Stephen F. Austin State University,* 486 F.Supp. 663, 666-68 (E.D.Tex. 1980)

96. *Dean* v. *Timpson Independent Sch. Dist.,* 486 F.Supp. 302, 307-8 (E.D.Tex. 1979)

97. *Jordan* v. *Cagle,* 474 F.Supp. 1198, 1210-12 (N.D. Miss. 1979)

98. *Barbre* v. *Garland Independent School Dist.,* 474 F.Supp. 687, 697-99 (N.D.Tex. 1979)

99. *Courts* v. *Economic Opport. Auth., Etc.,* 451 F.Supp. 587, 593 (S.D.Ga. 1978)

100. *Willingham* v. *Carter,* 447 F.Supp. 301, 302-3, 305 (S.D.Ga. 1978)

101. *Tanner* v. *McCall,* 441 F.Supp. 503, 509, 511-15 (M.D.Fla. 1977)

102. *Citron* v. *Jackson State University,* 456 F.Supp. 3, 10, 16 (S.D.Miss. 1977)

103. *Smith* v. *Price,* 446 F.Supp. 828, 833 (M.D.Ga. 1977)

104. *Johnson* v. *Cain,* 430 F.Supp. 518, 521 (N.D.Ala. 1977)

SIXTH CIRCUIT

105. *Columbus Ed. Ass'n* v. *Columbus City School Dist.,* 623 F.2d 1155, 1159-60 (6th Cir. 1980)

106. *Hickman* v. *Valley Local Sch. Dist. Bd. of Ed.,* 619 F.2d 606, 607-10 (6th Cir. 1980)

107. *Marwil* v. *Baker,* 499 F.Supp. 560, 570-72 (E.D.Mich. 1980)

108. *An-Ti Chai* v. *Michigan Technological University,* 493 F.Supp. 1137, 1158-59 (W.D.Mich. 1980)

109. *Heit* v. *Bugbee,* 494 F.Supp. 66, 66-67 (E.D.Mich. 1980)

110. *Carr* v. *Board of Trustees of University of Akron,* 465 F.Supp. 886, 902 (N.D.Ohio 1979)

111. *Arnold* v. *Ballard,* 448 F.Supp. 1025, 1029, 1031 (N.D.Ohio 1978)

112. *Sutton* v. *National Distillers Product Co.,* 445 F. Supp. 1319, 1327-28 (S.D.Ohio 1978)

113. *Berry* v. *School Dist. of Benton Harbor,* 442 F.Supp. 1280, 1293 (W.D.Mich. 1977)

114. *Hollifield* v. *McMahan,* 438 F.Supp. 591, 593 (E.D. Tenn. 1977)

115. *Penick* v. *Columbus Bd. of Ed.,* 429 F.Supp. 229, 260 (S.D.Ohio 1977)

SEVENTH CIRCUIT

116. *Sherkow* v. *State of Wis.,* 630 F.2d 498, 502 (7th Cir. 1980)

117. *McGill* v. *Board of Ed. of Pekin Elementary Sch.,* 602 F.2d 774, 777-79 (7th Cir. 1979)

118. *Eickman* v. *Ind. State Univ. Bd. of Trustees,* 597 F.2d 1104, 1108-9 (7th Cir. 1979)

119. *Buise* v. *Hudkins,* 584 F.2d 223, 232 (7th Cir. 1978)

120. *Palmer* v. *Board of Ed. of City of Chicago,* 466 F. Supp. 600, 604 (N.D.Ill. 1979)

121. *Wetmore* v. *Fields,* 458 F.Supp. 1131, 1145-46 (W.D. Wis. 1978)

122. *Newborn* v. *Morrison,* 440 F.Supp. 623, 627 (S.D.Ill. 1977)

123. *Weissbaum* v. *Hannon,* 439 F.Supp. 873, 879-80, 882 (N.D.Ill. 1977)

124. *Lasco* v. *Koch,* 428 F.Supp. 468, 475-76 (S.D.Ill. 1977)

EIGHTH CIRCUIT

125. *Lemons* v. *Morgan*, 629 F.2d 1389, 1390 (8th Cir. 1980)

126. *Nathanson* v. *United States*, 630 F.2d 1260, 1263 (8th Cir. 1980)

127. *Zoll* v. *Eastern Alamakee Community Sch. Dist.*, 588 F.2d 246, 249-51 (8th Cir. 1978)

128. *Greminger* v. *Seaborne*, 584 F.2d 275, 278 (8th Cir. 1978)

129. *Meyr* v. *Bd. of Ed. of Affton Sch. Dist.*, 572 F.2d 1229, 1232-33 (8th Cir. 1978)

130. *Williams* v. *Day*, 553 F.2d 1160, 1162-63 (8th Cir. 1977)

131. *Lee* v. *Consolidated Sch. Dist. No. 4, Grandview*, 494 F.Supp. 987, 990-91 (W.D.Mo. 1980)

132. *Hickingbottom* v. *Easley*, 494 F.Supp. 980, 984-86 (E.D.Ark. 1980)

133. *Cooper* v. *Ross*, 472 F.Supp. 802, 809, 811-12, 814 (E.D.Ark. 1979)

134. *Gerrin* v. *Hickey*, 464 F.Supp. 276, 282 (E.D.Ark. 1979)

135. *Atcherson* v. *Siebenmann*, 458 F.Supp. 526, 536-37 (S.D.Iowa 1978)

136. *Taylor* v. *Franklin Drapery Co., Inc.*, 441 F.Supp. 279, 297-98 (W.D.Mo. 1977)

137. *Giordano* v. *Roudebush*, 448 F.Supp. 899, 908 (S.D. Iowa 1977)

NINTH CIRCUIT

138. *Lutcher* v. *Musicians Union Local 47*, 633 F.2d 880, 885 (9th Cir. 1980)

139. *De La Cruz* v. *Tormey*, 582 F.2d 45, 58-59 (9th Cir. 1978)

140. *Haimowitz* v. *University of Nevada*, 579 F.2d 526, 529-30 (9th Cir. 1978)

141. *Wagle* v. *Murray*, 560 F.2d 401, 402-3 (9th Cir. 1977), rehearing of 546 F.2d 1329 (9th Cir. 1976)

142. *Bernasconi* v. *Tempe Elementary School Dist. No. 3*, 548 F.2d 857, 861-62 (9th Cir. 1977)

143. *Olsen* v. *Southern Pac. Transp. Co.*, 480 F.Supp. 773, 779-80 (N.D.Cal. 1979)

144. *Fujiwara* v. *Clark*, 477 F.Supp. 822, 833-37 (D. Hawaii 1979)

145. *Upshur* v. *Love*, 474 F.Supp. 332, 337, 339 (N.D.Cal. 1979)

146. *Fujiwara* v. *Clark*, 477 F.Supp. 809, 816-19, 821 (D.Hawaii 1979)

147. *Fujiwara* v. *Clark*, 477 F.Supp. 794, 800-02 (D.Hawaii 1978)

148. *Branch* v. *School Dist. No. 7 of Ravalli County*, 432 F.Supp. 608, 610-611 (D.Mont. 1977)

TENTH CIRCUIT

149. *Francia* v. *White*, 594 F.2d 778, 783 (10th Cir. 1979)

150. *Downes* v. *Beach*, 587 F.2d 469, 470-71 (10th Cir. 1978)

151. *Schmidt* v. *Fremont County Sch. Dist. No. 25, Wyo.*, 558 F.2d 982, 984-85 (10th Cir. 1977)

152. *Franklin* v. *Atkins*, 562 F.2d 1188, 1190-92 (10th Cir. 1977)

COURT OF CLAIMS

153. *Doyle* v. *United States*, 599 F.2d 984 (Ct.Cl. 1979)

154. *Skinner* v. *United States*, 594 F.2d 824 (Ct.Cl. 1979)

155. *Sanders* v. *United States*, 594 F.2d 804 (Ct.Cl. 1979)

156. *Ryder* v. *United States*, 585 F.2d 482 (Ct.Cl. 1978)

APPENDIX J

REPLY BRIEF OF DEFENDANTS-APPELLANTS AND ANSWERING BRIEF OF DEFENDANTS-CROSS-APPELLEES, PAGES 12-13

[12] The attempt to show that the court below applied the legal tests correctly and that the burden of proof was on the defendants misses the mark. Clearly the burden was on plaintiffs to establish that political discrimination "played a 'substantial' role" in the decision. *Givhan* v. *Western Line Consol. School Dist.*, 439 U.S. 410, 416 (1979). It is also indisputable that the court found only that plaintiffs "might not have been chosen" for layoffs but for their political affiliation. 457 F. Supp. at 243. That test is an unacceptably watered down version of *Givhan*, which requires a showing that "but for" the exercise of protected conduct, the employee would have been dismissed, no matter what the procedural burdens may be at trial (439 U.S. at 417). In this case it is virtually inconceivable that the State officials would have allowed both the *Wren* and *Bradley* plaintiffs to stay on the payroll except for the political affiliation of the *Wren* plaintiffs when the department had been laying men off even before the *Bradley* plaintiffs returned (e.g., CA.635-36).[1]

Branti v. *Finkel*, 48 U.S.L.W. at 4333-34, dispels any doubt about the necessity of plaintiffs' showing here that impermissible political discrimination was the *only* reason for the layoffs. The opinion for the Court by Mr. Justice Stevens [13] thrice reiterates the language of *Elrod* v. *Burns*, 427 U.S. at 350, that "the First Amendment prohibits the dismissal of a public employee *solely* because of his

[1] Indeed, it is stipulated here, that "[b]ut for the *Bradley* case none of the plaintiffs here would not have been laid off and this case would not have arisen," and the District Court so found (457 F. Supp. at 238).

private political beliefs." (Emphasis supplied.) That is a finding which defendants submit the evidence in this case would not remotely support.

In sum, this case is different from *Elrod, Branti* and all the other cases involving patronage dismissals. None of the underlying First Amendment considerations in those cases is present when a court order resulted in a surplus of manpower and the only men available to be laid off were members of one political party. There was no coercion of political beliefs, no unconstitutional condition on employment, no selection for political reasons at all. *Many other facts indicate that plaintiffs were not laid off "solely" for their political beliefs,* including the consultation with the office of the Attorney General who was a Republican. [Emphasis in this sentence only added by Petitioners] The evidence presented is legally insufficient to establish a First Amendment violation, and the judgment of the court below to the contrary, which has no evidentiary support, is unquestionably both "clearly erroneous" and based upon a misunderstanding of the law.

II. THE DOCTRINE OF QUALIFIED IMMUNITY BARS IMPOSITION OF DAMAGES AGAINST DEFENDANTS HANNIGAN AND RHOADS.

Defendants have argued that the doctrine of qualified immunity bars the imposition of damages against Hannigan and Rhoads because under the facts of this case there was no clearly

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In the Supreme Court of the United States

No. 80-2088

LEODA WREN, et al.,

Petitioners,

v.

NOLAN JONES, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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SORG/CHICAGO, U.S.A.

QUESTIONS PRESENTED

Although the petition presents eight questions and subquestions, it argues only two points in its Reasons for Granting the Writ, obviously because the other questions were not thought certworthy. We shall limit our reply to the questions argued, which can only be understood in the context of the following critical undisputed facts.

In 1973, an Illinois court ordered reinstated 29 Democratic road and other workers who, with all other employees in the same categories, had been replaced by Republicans when the Illinois governorship changed hands. At that time, the legislature was curtailing the appropriations for the state agencies involved. In order to make room for the Democrats ordered reinstated, state officials (defendant-respondents here) selected for layoff, where they could be identified, the employees who had replaced those particular Democrats. Since no Democrats remained in the affected classes, all of the persons laid off were Republicans (plaintiff-petitioners here). Petitioners are contending that this was a political firing in violation of § 1983.

In the light of these facts, the questions presented are:

1. (a) Whether plaintiff-petitioners have sustained their burden of proving they were laid off for political reasons in violation of the First and Fourteenth Amendments and § 1983.

   (b) If so, whether defendant-respondents have established that plaintiffs would have been laid off in any event.*

---

*If it should be found that defendants violated § 1983, respondents will present the question whether plaintiff's claim for damages is barred by the doctrine of qualified immunity, since the evidence undoubtedly establishes that defendants were acting without malice and without knowledge that they were violating a clearly established constitutional right.

2. The petition asserts that a number of other incidents justify the inference of political motivation drawn by the District Court, but it fails to mention much of the evidence which shows that those inferences are unreasonable. The question presented is whether the evidence as to those incidents was sufficient to support the trial court's finding that petitioners were laid off for political reasons in violation of § 1983.

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BRIEF IN OPPOSITION

STATEMENT OF FACTS*

In accordance with the then prevalent practice of both political parties, the new Republican administration in Illinois in 1969 removed from the classified civil service the positions of highway workers** who had been appointed and then covered in by the preceding Democratic administration. All were replaced by Republicans. Pet. App. 2a. In 1973, in a suit instituted by 30 of the removed Democrats (*Bradley*

*Citations herein are to Petitioner's Appendix ("Pet. App. ....."), Appendix of Defendants-Appellants ("A. ....."), Appendix of Plaintiffs-Appellees-Cross-Appellants ("CA ....."), and the page numbers by date of the trial transcript ("trans.") and exhibits.

**Although one of the 26 plaintiffs in this case was employed by the Department of Mental Health, we shall for convenience follow the petition in referring to the plaintiffs generally as highway workers.

v. *Cellini*, No. 2795-69 (Cir. Ct., Sangamon County), the Illinois Circuit Court held that the termination of the plaintiffs had been in violation of Illinois law, and ordered the officials of the state agencies involved within 30 days

> "to restore and return each of the Plaintiffs to the position and title held by such Plaintiff on the date of his discharge from said position or to discharge each Plaintiff in accordance with The Personnel Code and Rules of the Department of Personnel of Illinois." A. 346.

At that time, the state agencies involved were laying off a number of employees because of reduced appropriations. A. 77, 146. Accordingly, all the state officials called upon to implement the *Bradley* decision—who are the defendants in this case—assumed that employees would have to be laid off to make room for the persons ordered reinstated.

After some uncertainty as to how to reconcile the *Bradley* order with the Illinois civil service rules, it was finally decided that it would be most consistent with the Circuit Court's order to lay off the incumbents (or their successors) who had directly replaced the *Bradley* plaintiffs. A. 62a. All of the employees in the class had the same seniority, since all had been covered into the classified service on the same day. Pet. App. 17a, A. 62a.* "In four instances, where the

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*Seniority rights date from coverage into the Civil Service as a provisional employee, not from earlier uncovered employment. A. 125-126, 368-369 (Rule 2-570). The assertion in the petition (p. 21) that Rhoads admitted disregarding the seniority of petitioners Peeler and Johnson with "no justification" refers to Rhoads' answering "Not that I recall, no," to a leading question as to whether there was justification for laying them off. This answer overlooked the clear meaning of "seniority" under the personnel rules as running from the date of coverage of one's position into the civil service. This was fully explained in the testimony of Stephen Blakeman, who was in charge of verifying seniority for the Illinois Department of Personnel (IDOP). A. 125-26.

position could not be identified precisely, persons were laid off on a random basis from the returning *Bradley* plaintiffs' team section and class, with consideration given to performance." Pet. App. 5a.

Twenty-six of the persons laid off are the plaintiff-petitioners in this case. All were Republicans. Even though by then a new Democratic administration was in office, no Democrats remained in the classes from which the *Bradley* plaintiffs had been removed.

The above method of selecting the persons to be laid off was originally suggested by Robert Rhoads, the Chief Field Officer of IDOP then assigned to the Illinois Department of Transportation (IDOT), a career civil servant. A. 62a, 87. A number of other officials were consulted, including lawyers, and all concurred. A. 94, 187, 194. Some of these persons were in the civil service and some, including Brian Hannigan, who had a Democratic political background, were not.

None of the above facts are disputed. There was no direct evidence that plaintiffs had been selected for layoff for political reasons. See Pet. App. 33a. The testimony of all the witnesses with knowledge of what occurred was to the contrary.

The trial court nevertheless found that the layoffs were politically motivated and therefore in violation of § 1983. Principal reliance was placed on Hannigan's political background in Governor Walker's successful campaign for election. As to this the Court of Appeals found (Pet. App. 18a):

> "At this point, we should comment on the district court's heavy reliance on the history of patronage in Illinois politics. Although historical background is a proper factor in determining present motivation, *e.g., Arlington Heights, supra,* at 267, we believe that too great an emphasis was placed on this factor, and we are not persuaded that the political maneuverings of previous administrations, and even previous maneuverings of some

of the Wren defendants, can be said to be the reason for the personnel actions here contested."

The District Court referred to a number of other incidents as circumstancial evidence that the layoffs were politically motivated, even though there were no persons other than Republicans who could have been laid off. The petition contends that these and other incidents showed that the Court of Appeals erred in finding the District Court's conclusion clearly erroneous. Many of the incidents referred to in the petition (pp. 21-23) on their face concern alleged violations of state employment rules or policies, not of the United States Constitution, and we shall not take the time to deal with them here. As to those which the petition emphasizes and which the District Court relied on, the facts are as follows:

a. It is asserted that five of the plaintiffs here were not subsequently reinstated when five of the *Bradley* plaintiffs left their jobs. At the beginning, when two Bradley plaintiffs (Frank Davis in IDOT and Carl Eubanks in the Department of Mental Health) had notified the state officers that they would be physically unable to return to work, their replacements were not laid off. Pet. App. 37a., A. 56s-t, 310, 337, CA 637.* Subsequently, two positions which became vacant in the team sections to which the *Bradley* plaintiffs had returned were filled by Republicans, and one by a Democrat.**

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*The petition (p. 21) refers to the laying off of petitioner Caldwell. His predecessor reported to the IDOT District Office and completed processing his personnel papers, but he later did not show up for work, even though he apparently had given no notice to that effect. CA 637, 667A. As a result, Caldwell was laid off, and then was not reinstated pursuant to the policy of not adding unnecessarily to the work force.

**Harper, one of the plaintiffs, and Fitzpatrick, who were both subsequently reinstated, were Republicans. A. 561, 573. West, a Democrat, was employed in 1974, but not to the position, county or team section of Lovellette or any other of the plaintiffs. A. 56g ¶ 29, Trans. 4/26/77, pp. 151-152. Lovellette would not have been entitled to transfer to work in a different county unless he so requested, which he admitted he did not. *Id.* at 28.

Except for the latter, the work force remained Republican apart from the reinstated *Bradley* plaintiffs. The other vacant positions were not filled at all in response to the effort to live within the reduced appropriations. A. 115a.

b. The petition asserts (p. 20) that five of the *Bradley* plaintiffs were thought to be physically incapable of performing their work. Preliminary reports did so state. But the petition fails to point out that three of the five persons in question were subsequently found by an examining physician to be "fairly capable" of arduous physical exertion and that the other two were found "capable" of performing such duties. A. 403, 405, 407, 409, 411. Each of these five persons desired reinstatement and did return to work on a full-time basis. A. 238i-295.*

c. Although the Department of Transportation had raised a question as to the vision of five of the other *Bradley* plaintiffs and requested them to submit a report from a "vision specialist of their own choosing" (A. 402, 413-416), there is no evidence that any of them had an uncorrectable vision problem or that he was unable to perform his duties satisfactorily. The Department's policy permitted an employee to continue working despite visual defects "if he is performing his duties satisfactorily." A. 296. The only one of these persons to testify stated that he had no trouble seeing. A. 202.

d. The petition stresses the hiring of 32 temporary summer laborers at the time the layoffs in question were made. In 1973, as in prior years, the Department of Transportation had a statewide program of hiring students for a maximum of two to three months each summer as summer junior laborers. A. 56f, j, m, o. These temporary employees were not covered by civil service, received substantially less pay than had the plaintiffs, and were obviously not in the same

*Robert Rhoads testified that he advised District 9 Maintenance Chief Carl DeWitt that if DeWitt thought any of these five should be discharged to send papers to Rhoads for processing. District 9 never submitted discharge papers for any of the five. Trans. 11/21/77, p. 191; 4/26/77, p. 143; A. 96a, 97.

classification as the plaintiffs. A. 112, 172. They were prohibited by IDOT policy from engaging in activities requiring permanent employees. A. 238f, g. Civil service employees were permitted to accept a voluntary reduction to a lower class of work if they requested it,* but none of the petitioners had requested transfer to these temporary summer positions.

The District Court stated that layoffs were customarily based on seniority, and that the failure to rely on seniority here "can only be construed as an attempt to return to an earlier time" when politics controlled. Pet. App., p. 36a. This disregarded the evidence that all of the incumbent employees had the same seniority as defined by the Personnel Code (see p. 2, *supra*), and that all were Republicans. Pet. App. 2a.

The District Court "inferred that defendants intended to lay off a number of current employees equal to the number of *Bradley* plaintiffs without respect to whether these plaintiffs all returned to work or not." Pet. App., pp. 36a-37a. But the court then conceded that this was not true, since no one was laid off in the place of the one *Bradley* plaintiff who had notified IDOT that he was physically unable to work. Pet. App., p. 37a.

The District Court ordered the plaintiffs reinstated,** and held that Rhoads and Hannigan were liable in damages,*** because they "should have known that the layoffs were politically motivated" (Pet. App. 44a-45a). Even though the court found that they had no "malicious intent" (*id.* at 43a), and that their misconduct was not "intentional, will-

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*A written request for such voluntary reductions was required by Rule 2-530. A. 367.

**They had been restored to their positions *pendente lite* in 1977 (CA 744) and continue to be employed in these positions.

***The damages, costs and attorneys' fees awarded by the District Court amounted to approximately $470,000.

ful or wanton," it held that they could not "establish any basis for qualified immunity" (*id.* at 45a).

The Court of Appeals, finding the judgment clearly erroneous, reversed.

REASONS FOR DENYING THE WRIT

As the Court of Appeals pointed out, this case is "unique". Pet. App. 10a. No case has come close to holding or even intimating that § 1983 or the First Amendment is violated by laying off employees who are affiliated with the political party to which all the workers in the class belong in response to a court order to reinstate their predecessors who had been illegally discharged. Certainly, this Court's decisions on politically motivated discharges (*Elrod* v. *Burns*, 427 U.S. 347 (1976); *Branti* v. *Finkel*, 445 U.S. 507 (1980)) do not go that far. Indeed, they imply the contrary. Petitioners did not sustain their burden of showing that layoffs made in such circumstances deprived them of their rights under the First Amendment no matter which of the slightly varying formulations of their burden of proof be applied. Thus, this case does not call for a determination of whether the plaintiffs' membership in the Republican party was "the" or "a" or "a substantial" motivating factor in the defendants' decision to select the plaintiffs for layoff.

The question whether the miscellaneous incidents referred to in the petition were sufficient evidence to support the trial court's finding of political discrimination is one of fact. The Court of Appeals' rejection of this conclusion was, we submit, clearly correct. The issue is, in any event, not of general consequence warranting review by this Court.

1. The petition contends that the court below erroneously declared that the burden on plaintiffs was to prove that political affiliation was "the motivating factor for their discharge."

In its two political discharge cases, this Court reiterated that the plaintiffs had been dismissed "*solely* for [political]

reasons." *Elrod* v. *Burns*, plurality opinion of Justice Brennan, 427 U.S. at 349, 351 (emphasis in this and the following paragraph is supplied). The concurring opinion of Justices Stewart and Blackmun agreed only that a nonpolicy-making, nonconfidential government employee cannot "be discharged or threatened with discharge from a job that he is satisfactorily performing *upon the sole ground* of his political beliefs." *Id.* at 375.

Subsequently, *Branti* v. *Finkel*, 445 U.S. 507 (1980) summarized *Elrod* as holding that a government employee's "beliefs cannot be the *sole* basis for depriving him of continued public employment." *Id.* at 516. The *Branti* opinion then referred approvingly to:

> "the conclusion of both MR. JUSTICE BRENNAN and MR. JUSTICE STEWART that the First Amendment prohibits the dismissal of a public employee *solely* because of his private political beliefs."

The Court concluded (p. 517):

> "To prevail in this type of an action, it was sufficient, as *Elrod* holds, for respondents to prove that they were discharged '*solely* for the reason that they were not affiliated or sponsored by the Democratic party.'"

In the related but different line of cases, most of which protected the First Amendment rights of public school teachers to criticize their superiors, the Court has held that the plaintiff's burden was to show that constitutionally protected "conduct was a 'substantial factor'—or, to put in other words, that it was a 'motivating factor' in the Board's decision . . . ." *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977). The footnote cited footnote 21 in *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 270-271 (1977), decided the same day, which stated:

> "Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not

> necessarily have required invalidation of the challenged decision."

The *Mt. Healthy* opinion then added (p. 287):

> "Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct."

Most recently, the Court in *Givhan* v. *Western Line Consol. School District*, 439 U.S. 410 (1979), again speaking through Justice Rehnquist who had written the *Mt. Healthy* opinion, emphasized "substantial", rather than "a" or "the" in describing the plaintiff's initial burden of proof, holding that the employee was required to show (439 U.S. at 416) "that his constitutionally protected conduct played a 'substantial' role in the employer's decision not to rehire him." The burden would then be on the employer to prove, "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." *Ibid.*

After quoting all of the above passages from *Mt. Healthy*, *Arlington Heights* and *Givhan*, the court below spoke in terms of "the motivating factor" in holding that plaintiffs had not met their initial burden. The reiteration of "solely" in *Elrod* and *Branti* would seem to support this for political affiliation cases. There is no reason to believe that the use below of "the" instead of "a" motivating factor was intended to manifest a different standard. We submit, in any event, that the indisputable critical facts here establish that the result in this case would have been the same if "substantial" or "a" had been substituted for "the". Certainly the plaintiffs did not show by a preponderance of the evidence that their

political affiliation was "a substantial" factor in the decision to lay them off. Indeed, it was stipulated that each plaintiff would have remained in the employ of the State "but for" the *Bradley* court's order. A. 51.

The Court of Appeals went further, however, and held that in any event defendants had satisfied their burden under the second part of the *Mt. Healthy* test, finding (Pet. App. 16a-17a)

> "that the defendants have, by a preponderance of the evidence, established that fiscal restraints required a reduction in the affected units equivalent to the number of reinstated in *Bradley* employees, and that fiscal restraints justified the failure to reemploy the plaintiffs during the two year period after their layoffs. Therefore, although the same employees may not have been chosen, for example, had actual hire dates been used rather than the common seniority date of May 1, 1972, the fact would remain that some of the employees in the affected units would have to be laid off.* The fact that all potentially affected employees were Republican means that the Wren plaintiffs' political association was of no consequence, especially in light of the fact that no Democratic employees were hired into similar full-time positions in the same class during the two year period following the dates of the layoffs."

The facts last mentioned demonstrate even more clearly that plaintiffs had not satisfied their burden of proving by a preponderance of the evidence that they had been laid off in substantial part for political reasons.

We submit that no matter how the burden of proof is defined, the decision of the Court of Appeals is correct, and that there is no need for this Court in this case to determine

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*Plaintiffs do not argue that defendants had acted illegally because they did not lay off 26 other Republicans instead of plaintiffs. That would merely have resulted in this lawsuit having a different caption.

that question, or indeed whether the test for political dismissals is the same as for other types of First Amendment claims under § 1983.

2. As stated in the Statement of Facts, the petition purports to summarize various items of circumstantial evidence to show that the District Court was correct in finding that the selection of plaintiffs for layoff was politically motivated. The petition repeatedly refers to the length of the record ("a mass of testimony" (p. 10), "a small mountain of circumstantial evidence" (p. 13)) as demonstrating that the trial court's inference drawn from these incidents could not have been clearly erroneous. Although the evidence as to significant facts was not voluminous, it is true that the record was quite long. But that does not mean that the District Court's conclusions were correct, or even rational. There was little, if any, conflict in the testimony, so that credibility was not an issue.

We submit, as we argued below, that plaintiffs' analysis omits many of the facts of record which demonstrate that the incidents relied on do not prove that the layoffs were politically motivated. This is shown in the Statement of Facts, *supra* pp. 3-6, as to the allegations which come closest to showing political motivation. Many of plaintiffs' 11 items ((g), (h), (i), (j), (k)) present only allegations of violation of departmental practice or state law, not of constitutional rights.

The claim that defendants failed to reinstate some of petitioners when some of the *Bradley* plaintiffs subsequently ceased working does not prove political motivation in the light of the explanation that no one, and particularly no Democrat, was hired in their place; the object was to reduce expenditures. The only persons actually rehired in any plaintiff's class and unit or team section were Republicans Fitzpatrick and Harper. The claim that temporary non-civil service students were given temporary summer jobs

on a political basis does not prove that the layoffs of the plaintiffs were political. The summer students were not filling plaintiffs' jobs or depriving the plaintiffs of work. The same is true as to the hiring of five so-called "ghost" employees in the district to do other types of work for which plaintiffs were not shown to have been qualified. The claim that five of the *Bradley* plaintiffs were at first thought not to be physically qualified collapsed in the light of subsequent medical reports that they were "capable" or "fairly capable" of performing their duties; they did work. And there was no evidence that bad eyesight prevented any of the *Bradley* plaintiffs from working.

The other incidents referred to in the petition (pp. 21-23) were not relied on by the District Court and on their face have no direct relationship to the reasons why petitioners were laid off. It does not seem necessary to discuss them. With respect to a similar effort to rely on circumstantial evidence, the Fifth Circuit's comments in *Tanner* v. *McCall*, 625 F.2d 1183, 1192-1193 (C.A. 5, 1980), are equally applicable here; although "circumstantial evidence can be used to supply inferences of an intent to infringe constitutional rights . . . in this case, the objective manifestations do not supply inferences that rise to the level of proof of a subjective incident of political animus".

CONCLUSION

The "unusual" (Pet. App. 10a) facts of this case are not likely to recur. Whether plaintiffs or defendants satisfied their appropriate burdens of proof depends upon an evaluation of the facts. Whether plaintiffs' burden is defined in terms of proving "a", "the" or "substantial" political motivation, plaintiffs have not sustained it. Furthermore, they would not be entitled to prevail in any event, because, as the Court of Appeals found, the evidence clearly showed that defendants would have reached the same conclusion that

Republicans should be laid off without regard for political affiliation. Moreover, the doctrine of qualified immunity would have barred plaintiffs from recovering damages. Thus the case presents no question worthy of review by this Court.

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OCTOBER TERM, 1981

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh District

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

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AUGUST 6, 1981

SORG/CHICAGO, U.S.A.

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SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

The purpose of this memorandum is to call the Court's attention to the recent decision of the Seventh Circuit in *Nekolny* v. *Painter*, decided July 13, 1981, and reported in the United States Law Week for July 28, 1981. A copy of the opinion is appended hereto.

Petitioners' Reply Brief contends "that in the Seventh Circuit the burden of proof in patronage cases is now materially higher than in all other First Amendment cases involving sanctions against public employees," and that "that poses an issue of extraordinary importance."

The opinion in the *Nekolny* case was written by Judge Swygert, with Judges Cudahy and Wood concurring. Judges

Swygert and Cudahy were the two circuit judges on the panel which decided this case. The opinion in *Nekolny* interprets this Court's *Mt. Healthy* opinion as meaning "that the plaintiff has the initial burden of proving by a preponderance of the evidence that the protected conduct was a 'substantial' or 'motivating' factor" (Slip opinion pp. 6-7). The Seventh Circuit rejected the contention that plaintiff must prove that "the political reason be the sole motive." *Id., note 1.* Thus the position of the Seventh Circuit, and indeed of the same judges, is precisely what the petitioners in the instant case are advocating, and is clearly in accord with *Mt. Healthy* and *Givhan* as well as with the decisions of other circuits. There is clearly no need for this Court to grant review in order to correct the Seventh Circuit's position on that question.

We add only that the *Nekolny* opinion strongly suggests that the court's usage of 'a' and 'the' in its per curiam opinion in the instant case was not intended to convey a different meaning. In this case plaintiffs were not entitled to prevail no matter which of the slightly different methods of defining their burden of proof be adopted, as respondents have argued in their brief in opposition.

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1731

EDWARD NEKOLNY, PATRICK DUMAS, and MARIA L. DAHMS,

Plaintiffs-Appellees,

v.

ANN B. PAINTER, Individually and as Supervisor of Lyons Township,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-C-518—**John F. Grady**, *Judge.*

ARGUED FEBRUARY 19, 1981—DECIDED JULY 13, 1981

Before SWYGERT*, *Senior Circuit Judge*, WOOD, and CUDAHY, *Circuit Judges.*

SWYGERT, *Senior Circuit Judge.* This appeal involves the First Amendment rights of three Lyons Township employees who were found by a jury to have lost their jobs because they had campaigned for the Township Supervisor's opponent in an election. The defendant-appellant Supervisor alleges as error the district court's allocation of the burden and standard of proof; the directed verdict finding that the Senior Citizens' Coordinator was not a policymaker; the denial of immunity to the defendant in her individual capacity and the denial of qualified immunity; the admission of testimony as to statements made by the defendant's "liaison"; and the award of damages for mental and emotional distress.

* At the time of oral argument, Judge Swygert was a circuit judge in active service; he assumed senior status on July 1, 1981.

It is also contended that the verdicts were against the manifest weight of the evidence.

We affirm the judgments of the district court as regards plaintiffs Nekolny and Dahms, except for the damages awarded for mental and emotional distress to all three plaintiffs which are reversed for lack of a sufficient foundation in the record. We also hold that the directed verdict finding plaintiff Dumas not to be a policymaker was error. Accordingly we remand for a determination by the trier of fact according to the standards we have set forth in this opinion.

I

Ann Painter, a Republican and the defendant in this lawsuit, took office as Supervisor of Lyons Township on April 18, 1977. All three plaintiffs were at that time employed by Lyons Township, each having been hired during the term of the previous Supervisor. Plaintiff Edward Nekolny was a bus driver for the Senior Citizens' Bus Service; plaintiff Patrick Dumas was the Senior Citizens' Coordinator, and plaintiff Maria Dahms was a Secretary-Dispatcher. Within six weeks of Painter's incumbency, all three had lost their jobs, although the defendant asserted that Dahms had resigned voluntarily. Each plaintiff had campaigned vigorously for the defendant's opponent, a member of the Bipartisan Party, and against the defendant in the election for Supervisor.

Plaintiffs brought their action under 42 U.S.C. § 1983, alleging that defendant Painter had violated their constitutional rights to freedom of speech and association under the First and Fourteenth Amendments of the United States Constitution by terminating them or forcing them to resign from their positions with Lyons Township because of their campaign activity on behalf of her political opponent. Defendant took the position that Nekolny was dismissed because of health problems and concern for the safe transporting of senior citizens, that Dumas' position was abolished in keeping with defendant's campaign promise to eliminate the four top-paying appointed positions within the Township government, and that Dahms had voluntarily resigned on being

informed that due to a reassessment of program needs, her work load and pay would be decreased. Nekolny and Dahms testified that James Hickey, then defendant's liaison to the Senior Citizens' Bus Service, told them that the defendant wanted to terminate them because they had campaigned against her. Hickey denied making those statements. Although it was not disputed that Painter had made a campaign pledge to abolish four positions including that held by Dumas, it was also clear that after terminating Dumas, Painter named Hickey the new Senior Citizens' Coordinator, albeit at a reduced salary.

A jury trial on the issue of liability resulted in a verdict for the plaintiffs. Damages were assessed by the jury as follows: for Nekolny, $40,000 in lost earnings and fringe benefits, $5,000 for mental and emotional stress and $5,000 for punitive damages; for Dumas, $12,000 in lost earnings and fringe benefits, $13,000 for additional expenses, $2,500 for mental and emotional distress and $5,000 for punitive damages; for Dahms, $17,000 in lost earnings and fringe benefits, $2,500 for emotional and mental distress and $5,000 for punitive damages. This appeal followed.

II

The defendant argues that the trial judge incorrectly allocated the burden of proof when he instructed the jury on the issue of Painter's motive for terminating Nekolny, reducing Dahms' salary, and abolishing Dumas' position. The special interrogatory submitted to the jury was in two parts. It first required a finding that

> a motivating factor [in the termination of the respective plaintiff's employment] was the work the plaintiff performed in the campaign of the defendant's opponent and against the defendant. (On *this* question, the *Plaintiff* has the burden of proof.)

(emphasis in original.)

The form continued:

> If your answer to question No. 1 is "Yes" then answer question No. 2.

The second question asked whether the defendant would have taken the same action

> even if [the plaintiff] had not worked in McCullom's campaign: (On *this* question, the *Defendant* has the burden of proof).

(emphasis in original.)

The special interrogatory thus assigned each plaintiff the burden of proving that his or her campaign activities were a motivating factor in Painter's action. If the plaintiff succeeded, the burden of proof shifted to the defendant to prove that the defendant would have taken the same action with regard to the plaintiff's employment though he or she had not campaigned against the defendant.

According to the defendant, the proper allocation would have required proof that the sole reason for the defendant's unfavorable action was the campaign activities on behalf of Painter's opponent. Moreover, in the defendant's view the burden of proof should have rested entirely on the plaintiffs. It is argued that such an allocation was made in *Elrod v. Burns*, 427 U.S. 347 (1976), in which the Supreme Court held that employees of the Cook County Sheriff's office could not be discharged solely because of their partisan political affiliation. In *Elrod*, however, unlike the instant case, the issue of the motive for the firings was not disputed. There the defendant conceded that the employees were terminated because they were not Democrats. Thus the Court did not confront the issue of allocating the burden of proof on the motivation issue. Instead the question was whether a complaint alleging firings solely for partisan political reasons stated a First Amendment claim, and the Court held that it did. The similarity between our case and *Elrod* is that in both cases the plaintiffs alleged termination of their employment for political reasons in the context of an election. In our case, however, the defendant hotly contested plaintiffs' allegations that the terminations were political.

Because we are in this case faced with a dispute as to the motive for a termination of employment allegedly

for conduct protected by the First Amendment, our case is similar to *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). There a nontenured teacher was not rehired allegedly for exercising his First Amendment rights. In *Mount Healthy*, the defendant School Board had stated that one of the two reasons for not rehiring the plaintiff was conduct found by the district court to be "clearly protected by the First Amendment." The district court held that because that reason had played a "substantial part" in the Board's decision, the plaintiff was entitled to reinstatement with back pay. The Court of Appeals affirmed. The Supreme Court vacated the judgment and remanded for a determination made according to what it held to be the proper allocation of the burden of proof:

> Initially in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

429 U.S. at 287 (footnote omitted).

The *Mount Healthy* test was used by the trial judge in the instant case. Each plaintiff had the burden of proving that the protected conduct was a "motivating factor" in the action taken against him before the burden shifted to the defendant to prove that the termination would have occurred even if that plaintiff had not worked for the election of the defendant's opponent. In our view, that allocation was proper.

We must reject the defendant's suggestion that we adopt a "sole motive" test in the case of terminations of employment after a change of administration following an election. To require that the plaintiff prove that the protected conduct was the "sole motive" for his termina-

tion would in our view run the risk of not adequately protecting victims of First Amendment violations. One can scarcely imagine an employee about whom an employer could not find some other dissatisfaction apart from that employee's protected conduct. The claim of a public employee who was terminated in fact for protected conduct could too easily be defeated because his employer asserted a convincing but nonmotivating reason for the discharge. The *Mount Healthy* test allows a defendant to terminate an employee for any legitimate reason, even where, as in *Mount Healthy* itself, a reason violative of the First Amendment was also a substantial or motivating factor in the decision. It should also be noted that the plaintiff has the initial burden of proving by a preponderance of the evidence[1] that the protected

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[1] The defendant contends that the trial court erred when it instructed the jury that plaintiffs' burden was to prove their case by a preponderance of the evidence. Painter relies on Judge Campbell's concurrence in *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 579 (7th Cir. 1972), *cert. denied* 410 U.S. 928 (1973) in which he stated his view that in political discharge cases the burden should remain on the discharged employee to "demonstrate by the clear and convincing weight of the evidence that his dismissal resulted solely because of his political associations."

The *Mount Healthy* decision does not require the plaintiff to prove illegal motivation by clear and convincing evidence, and we have already noted that the test there established does not require that the illegal reason be the sole motive. The defendant argues, however, that a proper concern that government officials not be harassed by vexatious lawsuits brought in the context of changes in administration mandates a heavier burden than in other First Amendment discharge cases. We decline to adopt the defendant's suggestion. Rather we agree with then-Judge Stevens who addressed that concern in *Lewis*:

> If a government department is, in fact, managed on a nonpolitical basis, there is little likelihood that litigation alleging that dismissals were politically motivated would seriously hamper the administration of government. . . . The price which a government must pay to protect the constitutional liberties of its employees is some loss of the efficiency enjoyed by private employers; the Supreme

(Footnote continued on following page)

conduct was a "substantial" or "motivating" factor. That burden is not insignificant. A disgruntled employee fired for legitimate reasons would not be able to satisfy his burden merely by showing that he carried the political card of the opposition party or that he favored the defendant's opponent in the election.

In this case, the evidence showed that James Hickey, the defendant's liaison to the Senior Citizens' Bus Service and later the Senior Citizens' Coordinator, told Nekolny and Dahms that Painter wanted to terminate their employment because they had worked against her election. Plaintiff Dahms testified that Hickey said Dumas was out of a job for the same reason. It was not disputed that Painter had pledged in her campaign to abolish Dumas' job if she was elected. Nevertheless Dumas did not concede that his job was ultimately abolished but argued that it was resurrected in a somewhat altered form for Hickey who had worked in Painter's campaign. Although Hickey's reduced salary is evidence tending to support the defendant's position that Dumas was terminated for reasons having to do with the goals of the new administration, there was sufficient evidence that Dumas was terminated because he campaigned against Painter to allow that issue to go to the jury. We cannot say as a matter of law that there was no violation of Dumas' First Amendment rights.[2]

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[1] *continued*

Court has repeatedly decided that the value of those individual liberties is well worth the cost.

That cost will loom large only if it is assumed that political considerations will motivate a large number of employment decisions. . . . But to the extent employment decisions are based on political considerations, they involve a factor not normally present in the private sector; the tendency of that factor quite clearly is in the direction of less, rather than more, efficiency.

473 F.2d at 575.

[2] There is no merit to the defendant's contention that the verdicts were against the manifest weight of the evidence. Our review of the record reveals sufficient evidence on which the

(Footnote continued on following page)

III

The defendant also challenges the directed verdict entered in favor of plaintiff Dumas on the issue of whether Dumas was a policymaker and thus excepted from the prohibitions of *Elrod v. Burns*. Here we agree with the defendant and conclude that the trial judge erred in deciding as a matter of law that Dumas did not occupy a policymaking position.

The policymaking exception was discussed by this court in *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). Then-Judge Stevens stated:

> Plaintiffs properly do not challenge the public executive's right to use political philosophy or affiliation as one criterion in the selection of policymaking (sic) officials. Moreover, considerations of personal loyalty, or other factors besides determination of policy, may justify the employment of political associates in certain positions. . . . [J]ustification is a matter of proof or at least argument, directed at particular kinds of jobs.

473 F.2d at 574.

In *Elrod v. Burns*, 427 U.S. 347 (1976), Justice Brennan writing for a plurality of the Court, agreed with the *Lewis* distinction between policymaking and non-policymaking employees:

> A second interest advanced in support of patronage is the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. . . . Limiting patronage dismissals to policymaking positions is sufficient to achieve

[2] *continued*
jury could base its findings. Although much of plaintiffs' evidence was controverted by the defendant, issues of credibility are for the jury to decide. *Hampton v. Hanrahan*, 600 F.2d 600, 625 (7th Cir. 1979).

> this governmental end. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. . . . [C]onsideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals. Thus, the political loyalty "justification is a matter of proof, or at least argument, directed at particular kinds of jobs." *Illinois State Employees Union v. Lewis*, 473 F.2d, at 574. Since, as we have noted, it is the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests, the burden of establishing this justification as to any particular respondent will rest on the petitioners on remand, cases of doubt being resolved in favor of the particular respondent.

427 U.S. at 367-68.

Recently the Supreme Court, in upholding a determination that assistant public defenders were not policymakers and thus could not be fired for their political beliefs, noted:

> [T]he ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti v. Finkel, 445 U.S. 507, 518 (1980).

The determination of status as a policymaker in many cases presents a difficult factual question. *Rosenthal v. Rizzo*, 555 F.2d 390 (3d Cir.), *cert. denied*, 434 U.S. 892 (1977). We are persuaded that the plaintiff has here presented sufficient evidence from which a reasonable juror could conclude that Dumas' position was within the policymaking exception. A narrow definition of who is a policymaker necessarily increases the chances of "undercut[ting] . . . the implementation of the policies of the new administration, policies presumably sanctioned by the electorate." *Elrod*, 427 U.S. at 367. That ability of

the government to implement the will of the people is fundamental to our system of representative democracy. We recognize that policymaking and policy implementation may occur at many levels, even within a particular office whose sphere of authority is narrowly circumscribed. The test is whether the position held by the individual authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation.

That standard must be applied to Dumas, the ex-Senior Citizens' Coordinator of Lyons Township. His functions included conducting feasibility studies and other research concerning the nature and extent of programs for senior citizens. His proposals were directed to the Township Supervisor and the Board of Auditors. One program to help temporarily handicapped senior citizens was implemented by the prior administration at Dumas' recommendation and was abolished when Painter was elected Supervisor. Dumas was one of the four highest paid employees in the Township, tending to signify a position of some influence. That he did not have final decisionmaking authority is not determinative. *See Indiana State Employers Assoc., Inc. v. Negley*, 365 F. Supp. 225 (S.D. Ind. 1973), *aff'd*, 501 F.2d 1239 (7th Cir. 1974). There was, in short, evidence from which a reasonable juror could conclude that the Senior Citizens' Coordinator had meaningful input into decisionmaking concerning the nature and scope of a major township program. Therefore it was for the trier of fact to determine whether Dumas was a policymaker. The district court erred in directing a verdict on that issue.

IV

The defendant next argues that she is immune from liability individually and is liable, if at all, only in her official capacity. The plaintiffs sued Painter both individually and as Supervisor of Lyons Township. Official-capacity suits, the Supreme Court has stated, "generally represent only another way

of pleading an action against an entity of which an officer is an agent. . . ." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n.55 (1978). In *Monell* the Court, overruling *Monroe v. Pape*, 365 U.S. 167 (1961), held that local governments were "persons" and thus suable under § 1983. Damages sought from government officers in their official capacity had before *Monell* often been barred as "subterfuges that contravene the exemption from § 1983 announced in *Monroe* [for municipalities]." *Muzquiz v. City of San Antonio*, 528 F.2d 499 (5th Cir. 1976) (en banc) (adopting in pertinent part 520 F.2d 1002, 1009 (Godbold, J., dissenting)); *see generally* Nahmod, Civil Rights & Civil Liberties Litigation at § 6.04.

Here plaintiffs sued Painter individually in order to be able to collect damages from Painter herself and thus establish that Township funds were not their only source of relief. Now that *Monell* allows municipalities to be sued in their own name, recovery from the public treasury is possible in cases of government officials being sued in their official capacity. Defendant incorrectly leaps to the conclusion, however, that therefore only an official capacity and not an individual suit is appropriate here. We see no reason to assume on the basis of *Monell* that the law of individual liability has changed. We are unpersuaded that the district court should have immunized Painter from individual liability in this action.

Painter also contends that the trial judge erroneously failed to grant her qualified immunity. We do not agree. To be entitled to the special exemption from § 1983 liability provided by the doctrine of qualified immunity, Painter

> must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of [her employees].

Wood v. Strickland, 420 U.S. 308, 322 (1975).

She is not immune from liability if she

> knew or reasonably should have known that the action [she] took within [her] sphere of official responsibility would violate the constitutional rights of [those] affected, or if [she] took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff].

Id.

Without reaching the issue of her subjective intent we conclude that the trial judge properly determined that Painter knew or should have known that her actions were constitutionally infirm. The jury found that the termination of each plaintiff's employment was politically motivated, in violation of that plaintiff's First Amendment rights. It is clear that the law was not unsettled on this point. In *Elrod v. Burns*, 427 U.S. 347 (1976), the Supreme Court had expressly forbidden political firings following an election, and in *Mount Healthy City School District Board of Education v. Doyle*, 329 U.S. 274 (1977), the Court held that the presence of both permissible and impermissible motives did not legalize a termination that would not have occurred but for the existence of conduct protected by the First Amendment. Qualified immunity was not available to the defendant here.

V

The defendant alleges that the trial court erred in admitting testimony as to statements allegedly made by James Hickey concerning the defendant's state of mind.[3]

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[3] Plaintiff Nekolny testified that Hickey told him, "You know I tried to talk to Ann Painter. I tried to save your job for you, but the way you and your wife worked in the campaign I can't do anything with Ann Painter. You are being fired." Plaintiff Dahms also testifed to hearing Hickey make those statements. Moreover, in a separate meeting with Hickey, Dahms testified that Hickey said "Mrs. Painter was very upset with all of us. She was a very vindictive person and was set on cleaning house and getting rid of everyone that

(Footnote continued on following page)

Testimony as to Hickey's statements was allowed as admissions against the defendant by her agent. Painter argues that those statements should not have been admitted because Hickey did not have authority to say either what he did or anything else concerning the plaintiffs' employment.

Admissibility in this instance is controlled by Rule 801(d)(2)(D) of the Federal Rules of Evidence, which provides:

> A statement is not hearsay if . . . [it] is offered against a party and is . . . a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship. . . .

We cannot say that the trial judge erred in concluding that Hickey was Painter's agent and that his statements concerned "a matter within the scope of his agency or employment." Rule 801(d)(2)(C), unlike 801(d)(2)(D), requires that a statement be "by a person authorized by him to make a statement concerning the subject." Rule 801(d)(2)(D), however, says nothing about an agent having authority to make a statement on a particular subject. After the fact of the agency is established, Rule 801(d)(2)(D) requires only that the statement "concern a matter within the scope of [the] agency or employment." *Northern Oil Co., Inc. v. Socony Motor Oil Co., Inc.*, 347 F.2d 81 (2d Cir. 1965), cited by the defendant for the proposition that the agent must have authority to make statements in a given area, was decided before the enactment of Rule 801(d)(2)(D). In fact, *Northern Oil* was referred to in the Advisory Committee Notes to Rule 801(d)(2)(D) as an example of the older and more narrow view not favored by the Committee. Notes of Advisory Committee on Proposed Rules (*reprinted in* Fed.

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[3] *continued*

campaigned against her." Dahms also testified that Hickey said he was Painter's "personal hatchet man," that Hickey suggested Dahms was also "going" for campaigning against Painter, and stated that Painter had not "figured out how she was going to get rid of me yet."

Rules Evid. Rule 801, 28 U.S.C.A.). Rule 801(d)(2)(D) takes the broader view that an agent or servant who speaks on any matter within the scope of his agency or employment during the existence of that relationship, is unlikely to make statements damaging to his principal or employer unless those statements are true.

Here Painter herself testified that Hickey was her "liaison" and "advisor" to the senior citizens program, in which all three plaintiffs were employed. Painter acknowledged that she met with Hickey "almost every day." Painter stated that she and Hickey had interviewed Dahms for the job, that she and Hickey had discussed Dahms' work, that Hickey had recommended to her that Dahms' work load be reduced, and that she had directed Hickey to communicate news of the reduction to Dahms. Hickey, who had previously investigated and reported to Painter on Nekolny's health and job performance, was charged by Painter with delivery of the letter terminating his employment as well. Painter also conceded that she herself had had almost no contact with any of the plaintiffs. In her brief, Painter argues that an agency cannot be established by the statements of the agent alone. In this case, however, the principal's own testimony establishes the fact and the scope of the agency relationship sufficiently to make the disputed statements admissible.[4]

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[4] Although we need not rely on Hickey's testimony, we note that the

> broadly stated proposition that the authority of an agent cannot be proved "out of the mouth of the agent" is true only if it is considered with its numerous exceptions. . . . For example, when made in court under oath, subject to the tests of cross examination and penalties of perjury, those circumstances are regarded as making the statement sufficiently trustworthy to be received.

Murphy Auto Parts Co. v. Ball, 249 F.2d 508, 510 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 932 (1958). Hickey's testimony about his job responsibilities and the testimony of the plaintiffs reinforce our conclusion.

It is clear to us, as it was to the plaintiffs, that Hickey was speaking of a matter within the scope of his agency or employment when he discussed with Dahms and Nekolny the reasons for the decisions concerning their employment.

VI

Finally, the defendant argues for reversal on the damages awarded for emotional and mental distress. We agree that there was insufficient evidence of injury to support the award.

Although mental and emotional distress caused by the denial of First Amendment rights is compensable, an award of damages for such injury will not stand without proof that such injury actually was caused. *See Carey v. Piphus*, 435 U.S. 247, 264 (1978); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). The only evidence of injury contained in this record was Nekolny's testimony that on learning he was terminated he was "very depressed," Dahms' statement that she was at one point subsequent to leaving her job "a little despondent and [lacking] motivation," and Dumas' testimony, on being asked whether he looked for employment after losing his job, "Well, I didn't work for six weeks, I was completely humiliated, and I stayed close to home."

That evidence is insufficient to constitute proof of compensable mental or emotional injury.

> Although essentially subjective, genuine injury in this respect may be evidenced by one's conduct and observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury.

Carey v. Piphus, 435 U.S. at 264 n.20 (citation omitted).

A single statement by a party that he was "depressed," "a little despondent," or even "completely humiliated" (the latter in the context of explaining why other employment was not sought), is not enough to establish injury even when the statement is considered

along with the facts of this case. The circumstances here do not approach the egregiousness of those found in *Seaton v. Sky Realty Company, Inc.*, 491 F.2d 634 (7th Cir. 1974).

Although at one point the trial judge decided that he would not permit evidence on the issue of emotional injury, plaintiffs' counsel did not make an offer of proof according to Federal Rule of Evidence 103(a)(2). Moreover, counsel did not offer to present further evidence when the judge later reversed his position and decided to allow the jury to award damages on this issue. According to the record presented here, plaintiffs were not entitled to damages for emotional injury and the award of those damages must be reversed.

VII

The judgments in favor of Nekolny and Dahms are affirmed except for that portion of the damage award attributable to mental and emotional distress. Because a directed verdict was erroneously entered on the issue of whether plaintiff Dumas was a policymaker, we vacate the judgment and remand for a determination on that issue by the trier of fact. In the event Dumas is found not to be a policymaker, he is entitled to all damages except those attributable to mental and emotional distress.

CUDAHY, *Circuit Judge*, concurring:

I agree that *Mount Healthy* compels us to shift the burden of persuasion to the defendant once the plaintiffs have made a prima facie showing that political activity was a "motivating factor" in the discharges. As a matter of good policy, however, it is unclear to me why the analysis of *Texas Department of Community Affairs v. Burdine*, 49 U.S.L.W. 4214 (March 4, 1981) should not be equally appropriate here. In *Burdine*, a Title VII case, the Court held that the ultimate burden of persuasion "remains at all time with the plaintiff," although once the plaintiff has proved a prima facie case of discrimination, the defendant bears the intermediate burden of "producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Id.* at 4216.

Although it is a leading decision involving the First Amendment rights of government employees, *Mount Healthy* did not address allegedly partisan political terminations in the framework of an election, where the reasonable prerogatives of the candidates returned by the voters must be weighed in the balance. In addition, successful candidates may be assigned the ultimate burden of proving the propriety of wholly meritorious firings. While the result in the case before us does not seem inappropriate, I am concerned that, in the context of allegedly partisan discharges of defeated campaigners, the broad sweep of the *Mount Healthy* analysis may create undesirable pitfalls for successful candidates.

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No. 80-2088

In the
Supreme Court of the United States
October Term, 1980

LEODA WREN, et al.,
Petitioners,

vs.

NOLAN JONES, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The real issues presented by this case are two:

1. Should the dual motivation standard of *Mt. Healthy City School District Bd. of Ed.* v. *Doyle,* 429 U.S. 274, 287 (1977) continue to be applied in First Amendment cases of this kind, or should the Seventh Circuit's sole motivation doctrine prevail?

Respondents contend (Resp. Br. 7-8) that the "sole basis" references in *Elrod* v. *Burns,* 427 U.S. 347, 351 (1976) and *Branti* v. *Finkel,* 445 U.S. 507, 516, 517 (1980)

justify the new Seventh Circuit burden of proof "for political affiliation cases." (Resp. Br. 9) That suggests that in the Seventh Circuit the burden of proof in patronage cases is now materially higher than in all other First Amendment cases involving sanctions against public employees. (Resp. Br. 8-9) That poses an issue of extraordinary importance.

However, the more natural reading of the new Seventh Circuit doctrine is that its "sole motivation" rule applies to *all* public employee cases, not just the patronage ones. Thus in *McGill* v. *Board of Ed. of Pekin Elementary School Dist.*, 602 F.2d 774, 779 (7th Cir. 1979) (*nota bene* 779 n. 8) the Seventh Circuit applied its sole motivation rule in a teacher speech case.

Here, the District Judge's findings were reviewed according to the Seventh Circuit anti-*Mt. Healthy* standard. The burden of proof issue thus presented is common to a multitude of pending and future First Amendment cases. See the 156 *Mt. Healthy* opinions collected at Pet. App. 62-72. That makes it immensely important.

2. Respondents ignore the dangerous misuse of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) in this case. See Pet. 12-13.

Respondents devote their brief to the claim that this case has no merit. But here the District Judge held the First Amendment violated, and even the Court of Appeals admitted some "infringement of . . . plaintiffs' First Amendment right[s] . . . ." (App. 17) Thus confronted, respondents obfuscate:

First. Respondents ignore the decision of the trier of fact which resolved the issues in petitioners' favor as to facts, motive and intent.*

Second. Respondents seek to trivialize petitioners' claim by pretending that one of the two constitutional issues in this case does not exist. Throughout their brief respondents imply that the only constitutional issue is whether they wrongfully *laid off* petitioners. That contradicts the record. The District Judge put it clearly:

> Plaintiffs present two issues asserting violations of plaintiffs' rights under the first amendment. . . . Secondly, *plaintiffs assert that defendants denied them re-employment opportunities in furtherance of*

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* Respondents' brief seems to reflect a notion that the District Judge had a duty to believe everything that a respondent testified to. For a good example of why they are wrong, see the Appendix to this reply.

Every one of respondents' quarrels with the District Judge's findings can be refuted. To take but one example, respondents make the "incident" of the new DOT jobs from which petitioners were excluded look almost stupefyingly innocent. (Resp. Br. 6) But the facts show:

Thirty-two summer patronage jobs in petitioners' district were created on the day petitioners were laid off. (Pet. 18-19) Respondents suggest that petitioners could not to be transferred to those jobs because they did not apply for them before they were laid off. (Resp. Br. 6) But in fact, respondents had falsified performance reports and withheld layoff notices with the result that petitioners did not know the layoffs were coming. (Pet. 18-19, 21-23) Patronage Chief Hannigan then denied a petitioner's transfer application because it came after his layoff. But a *non*-petitioner's post-layoff application was granted that same month. (Pet. 23) It turned out that *prior* to the layoffs, patronage chief Hannigan had vetoed a recommendation by respondent Rhodes that petitioners be permitted to transfer. (Pet. 18-19)

A reasonable District Judge reasonably smelled a rat.

> ***a patronage program and thus violated plaintiffs' first amendment rights.***
>
> Pet. App. 32 (emphasis added).

The Petition for Certiorari presented this second issue five times. (Pet. 1 ¶2, 9, 10, 11, 16-17.)

By implying that this "re-employment" issue does not exist, respondents manage to shrug off as "miscellaneous incidents" (Resp. Br. 7) much of the evidence on which the District Judge relied. This evidence not only showed motive and intent with reference to the original layoff decision, but also clearly proved an *independent* First Amendment wrong—*keeping* petitioners laid off because they were Republicans. As the District Judge found, those wrongs were not induced by fiscal shortages. (App. 35-38, and see Pet. 18-23, for more details.) Respondents are simply fighting with the findings and fighting with the proof when they claim innocence on this issue.

Finally, respondents argue (Resp. Br. 4): "Many of the incidents . . . concern alleged violations of state employment rules or policies, not of the United States Constitution, and we shall not take time to deal with them here." Sophistry. The "incidents" involve violations of state rules committed for the purpose of discriminating against petitioners because they were Republicans. The District Judge found that a violation of the First Amendment and he was right.

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

The District Judge did not believe that fiscal shortages were responsible for respondents' refusals to re-employ petitioners on a series of occasions, and he said so, citing part of the abundant evidence on that score. (App. 37-38) But respondents, citing a single answer by patronage chief Hannigan, now argue the contrary. Here are the quotes:

Respondents' Brief:

"The other vacant positions were not filled at all in response to the effort to live within the reduced appropriations. A. 115a." (Resp. Br. 5; see Resp. Br. 4* for more of the same.)

Testimony of Hannigan at A. 115a:

"Q Was there any time when the Wren Plaintiffs were on a re-employment list where there was a vacancy to be filled that you rejected the Wren Plaintiffs that was on the re-employment list?

A Well, I recall that there were vacancies which occurred and which, after much correspondence was received from Mr. Hanley requesting that certain Wren Plaintiffs, who were on re-employment lists, be re-employed. However, we wouldn't be at the point of considering a re-employment list unless a requisition to fill that position had been received from the District, and approved, and we went ahead and determined that there was a legitimate vacancy and that the agency can't carry out its function, unless that position was filled. We were really pretty intent on not filling any position for quite some time because of the budgetary straits that all of State Government was in at that time.

I think the record will show that there weren't very many full-time positions hired for quite some period."

Our comments: The answer doesn't support respondents' assertion. The answer evades the question. The answer is vague, full of self-serving generalities.

The District Judge was not required to accept patronage chief Hannigan's conclusions as to an ultimate issue in this case. In fact, he rejected them. That ought to settle the facts on appeal. Respondents are simply quarreling with a verdict.